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Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority

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PRIORITIZING JUSTICE: COMBATING CORPORATE CRIME FROM TASK FORCE TO TOP PRIORITY

MARY KREINER RAMIREZ*

Inadequate law enforcement against corporate criminals appears to have created perverse incentives leading to an economic crisis—this time in the context of the subprime mortgage crisis. Prioritizing Justice proposes institutional reform at the Department of Justice (DOJ) in pursuing corporate crime. Presently, corporate crime is pursued nationally primarily through the DOJ Financial Fraud Enforcement Task Force and other task forces, the DOJ Criminal Division Fraud Section, and the individual U.S. Attorneys’ Offices. Rather than a collection of ad hoc task forces that seek to coordinate policy among a vast array of offices and agencies, a Corporate Crimes Division should be created as a permanent base in the DOJ to combat the relentless waves of corporate criminality. The Corporate Crimes Division would more efficiently investigate and prosecute crimes of national and multinational corporations spanning multiple districts, and pursue a coordinated national policy that affirms the commitment of the DOJ to fight large-scale corporate crime which costs taxpayers billions of dollars, frustrates financial markets, increases the cost of capital to honest businesses, and undermines citizens’ confidence in the rule of law. Given the cost of corporate crime, creating the division would promote superior institutional design that should yield substantial benefit.

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I. INTRODUCTION

If they aren't out there looking for fraud, it's a good bet they won't find it.¹

Once again, inadequate law enforcement against corporate criminals appears to have created perverse incentives leading to an economic crisis—this time in the context of the subprime mortgage crisis.² The Securities and Exchange Commission (SEC) recently announced that it plans to enhance its civil enforcement capabilities.³ There have also been scattered criminal actions addressing isolated wrongdoing by lesser known individuals.⁴ In the summer of 2009, the SEC leveled civil charges against Angelo Mozilo, the CEO of Countrywide Financial Corporation.⁵ Yet, as of the fall of 2009, no criminal charges had been filed against any major firm or any high-profile CEO.⁶ Moreover, all of the limited law enforcement activity mentioned above occurred only after the crisis. Enforcement laxity had distorted incentives facing putative white-collar criminals long before.

1. Emily Barker et al., *Progress Report*, AM. LAW. & CORP. COUNS. (LITIGATION 2007: CORPORATE FRAUD), Fall 2007, at 35, 39 (reporting on the decline in corporate fraud investigations beginning in 2004).

2. See Joseph E. Stiglitz, *Obama's Ersatz Capitalism*, N.Y. TIMES, Apr. 1, 2009, at A31.

3. Jonathan Stempel, SEC Plans More Subpoena Power, Enforcement Units, Reuters (Aug. 5, 2009), <http://www.reuters.com/article/idUSTRE57504V20090806>.

4. See, e.g., Michael A. Fletcher, *Former Fund Managers Face Fraud Charges in Credit Crisis*, WASH. POST, June 20, 2008, at A1.

5. Stempel, *supra* note 3; see also Kara Scannell & John R. Emshwiller, *Countrywide Chiefs Charged with Fraud*, WALL ST. J., June 5, 2009, at C1 (reporting that civil securities charges were filed by the SEC against former Countrywide executives CEO Angelo Mozilo, COO David Sambol, and CFO Eric Sieracki, and that a federal criminal investigation is ongoing).

6. Martha Graybow & Randal Mikkelsen, *Subprime Criminal Probes Yet to Catch Big Fish*, Reuters (June 9, 2008), <http://www.reuters.com/article/idUSN0945592020080610>. The lack of high-profile cases may be attributed in part to the difficulty in investigating white-collar crime, the complexity of the cases, and the high burden of proof in criminal cases. See *id.*

Presently the United States prosecutes corporate crime through several different avenues: the Criminal Division of the United States Department of Justice (DOJ) polices national policy throughout the DOJ divisions, agencies, and U.S. Attorneys' Offices.⁷ The Criminal Division also takes on significant litigation that includes prosecution of white-collar crime through its Fraud Section. That section addresses a variety of criminal practices including those related to consumer fraud, identity theft, and the Foreign Corrupt Practices Act.⁸ The DOJ has established several task forces dedicated to or substantially related to corporate crime: the Financial Fraud Enforcement Task Force, the Corporate Fraud Task Force, the Enron Task Force, and the National Procurement Fraud Task Force.⁹ The task forces coordinate efforts among the Attorney General and relevant departments, agencies, and offices of the United States.

Rather than combating the relentless waves of corporate criminality with a collection of ad hoc task forces that seek to coordinate policy among a vast array of offices and agencies, the DOJ should create a Corporate Crimes Division as a permanent base in the department from which to pursue national policy and to more efficiently investigate and prosecute such crimes. The mission of the Corporate Crimes Division would be to specialize in investigating and prosecuting corporate crime by developing expertise that includes legal and related professional expertise, as well as considering and recommending national policy regarding that mission. The time taken to investigate major corporate criminal acts is costly to the typical U.S. Attorney's Office tasked with pursuing a wide variety of both criminal and civil cases, as well as defending the United States, its agents, and its officers in wide-ranging civil suits.¹⁰ Consequently, such corporate criminal cases can only be pursued in local U.S. Attorneys' Offices at the expense of other cases, many of which are easier to investigate and less costly to prosecute. For the numbers-driven manager focused on reporting high conviction numbers to support office funding, the long-run potential for convictions in corporate crime cases may seem slight compared to the short-run costs.¹¹ Moreover, pursuing powerful corporations in one's district has the added disadvantage of

7. United States Department of Justice, Criminal Division Homepage, <http://www.justice.gov/criminal/> (last visited July 14, 2010) [hereinafter Criminal Division Homepage].

8. See U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, FRAUD SECTION ACTIVITIES REP. 5 (2007), <http://www.justice.gov/criminal/fraud/documents/reports/2007/actrpt07.pdf>.

9. See *infra* Part III.A.

10. See DAVID O. FRIEDRICH, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 278 (3d ed. 2007).

11. See generally U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., FY 2008 PERFORMANCE & ACCOUNTABILITY REP. (2008), <http://www.justice.gov/ag/annualreports/pr2008/2008par.pdf> [hereinafter FY 2008 PERFORMANCE & ACCOUNTABILITY REPORT].

creating potential political difficulties for the U.S. Attorney, and possibly limiting employment prospects for those who leave government service and hope to gain employment with the private sector.¹²

A Corporate Crimes Division would offer a superior institutional design.¹³ It would sharpen the expertise of the lawyers, economists, accountants, financial analysts, and related professionals within the narrow focus of its mission. That expertise could then be efficiently employed to pursue appropriate cases of corporate criminality. An increase in experience and an undivided mission to pursue such crimes would eliminate the cost-benefit analysis that arises in the local U.S. Attorneys' Offices in selecting which cases to pursue. Finally, since the decision to prosecute is made at a national level, the corporate wrongdoer would be less likely to improperly influence the decisions to investigate and prosecute.

The estimated direct cost of economic crime outweighs the direct cost of street crime by measures ranging from 10 to 1, to 50 to 1.¹⁴ Segregating corporate crime from other types of economic crimes is appropriate because

12. FRIEDRICHS, *supra* note 10, at 327–28 (crediting as sources of white-collar crime corruption both campaign contributions and the “revolving door syndrome,” in which governmental employees with considerable power move into and out of private-sector positions).

13. Among the recent articles on institutional design, several authors have applied design theory to matters of criminal law and procedure. *See, e.g.*, Rachel E. Barkow, *Institutional Design & the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895–906 (2009) (applying the lessons of institutional design in administrative law to propose means of curbing abuses of prosecutorial discretion and enhancing supervision); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 828–34 (2004) (proposing default rules that rationalize apportionment of resources to better protect constitutional criminal procedural rights); Michael C. Dorf, *Legal Indeterminacy & Institutional Design*, 78 N.Y.U. L. REV. 875, 935–37 (2003) (proposing means by which experimentalist courts can address the indeterminacy of problem-solving courts). A common theme in institutional design is that the structure of an institution will directly impact its productive capacity in achieving positive results. *See, e.g.*, Dorf, *supra*, at 886.

14. *See* FRIEDRICHS, *supra* note 10, at 46 (identifying a variety of sources for cost estimates, including one comparison of \$250 billion for white-collar crime to \$4 billion for street crime, and observing that “economic losses . . . have been estimated as high as \$1 trillion annually”); FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK: THE FIGHT TO CRIMINALIZE BUSINESS VIOLENCE 17–23 (2006) (reviewing various estimates of the cost of corporate crime, and observing that “[t]he tremendous economic impact of corporate lawlessness results in part from the extensive involvement of business in unlawful activities, but it is also due to the reality that the costs of even a single corporate offense are often immense”). Highlighting just a few of the many corporate frauds, the authors cited the 1973 conviction of Equity Funding Corporation of America, a company that in 1960 began issuing phony insurance policies, resulting in a reported \$2 billion loss; the 1985 guilty plea by E.F. Hutton for a check kiting scheme involving nearly \$10 billion; the 1980s crash of the savings and loan industry, which produced estimated losses of \$200 billion; the 1980s insider trading scandal; and the exposure of widespread corporate accounting fraud beginning in 2001 with Enron’s collapse into bankruptcy that resulted in a loss of \$60 billion in market value for Enron, exposed \$11 billion in fraud at WorldCom, and fueled hundreds of criminal investigations yielding even more convictions and discovery of costly crimes. *Id.* at 19–23.

of the complex structure of business organizations, the often-multidistrict effect of the criminality, and the complexity of the laws that govern corporate conduct, such as securities and banking laws. It is also appropriate because the current institutional structure of the DOJ with respect to corporate criminality is grossly inadequate.

The current approach of using task forces, such as the Financial Fraud Enforcement Task Force, places a Band-Aid on a gaping wound. With continuous narrowing of civil avenues to address corporate misconduct, prosecution of corporate crime becomes critical to meaningfully protect our national financial structure. Corporate crime and the resulting financial failures undermine confidence in our markets, reduce national and foreign investment in our businesses, increase the cost of doing business for all businesses (including the honest businesses), and impose long-term consequences on every person in the country through government bailouts.¹⁵ These bailouts increase national debt, impose greater tax burdens on citizens and taxpayers, and reduce other government-sponsored, broadly applied social services to pay for the wrongdoing of a few.¹⁶

Part II of this Article provides a historical view of the rise of the (multinational) corporation, and the associated crime that has followed its trajectory. Part III reviews the current national approach to corporate crime. Part IV proposes a Corporate Crimes Division as a means of pursuing national policy and developing expertise in corporate crime fighting, and highlights the benefits of such a division. Any change in institutional design poses challenges, and those challenges are raised and considered here. Means to address risks associated with developing a Corporate Crimes Division and tempering such risks to effectuate the goals of the new division are suggested. This Article concludes that the benefits gained from a cohesive national pursuit of corporate criminality well outweigh the risks associated with such a pursuit. Most significantly, every lawful citizen and business stands to gain when costs associated with corporate crime decrease and confidence in our economy and its underlying corporate structures booms.¹⁷

15. See Steven A. Ramirez, *Arbitration & Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1057 (1999) (discussing the need for public confidence in the integrity of our business markets).

16. See *id.* at 1056–57.

17. Socialization of risk is a key element to corporate success. FRIEDRICH, *supra* note 10, at 59 (observing that corporations enjoying the benefits of success during good times lobby for deregulation so that they are free to exploit the maximum profits from corporate activity; however, corporate liability from exposure to risk is limited, and in instances when corporate criminality leads to harm, the government is often asked to bail out the corporation or to clean up afterward). See, e.g., Stiglitz, *supra* note 2 (criticizing President Barack Obama's bailout of the banks as providing perverse incentives to corporate managers that reward corporate risk-taking with oversized profits while socializing losses to be borne by American taxpayers).

II. THE RISE OF THE MULTINATIONAL CORPORATION AND THE ASSOCIATED CRIME WAVE

A. Corporate Growth and Dominance

Corporations have grown exponentially.¹⁸ Although “[t]he legal idea of a corporation can be traced back to Roman times[,] . . . the modern corporation, with specific corporate powers, can be recognized in the East India Company, founded in 1612.”¹⁹ In 1988, the top 20% of “the *Fortune 500* corporations [held] a greater share of all manufacturing profits than all the other 370,000 manufacturing firms combined[,] . . . employ[ed] well over two-thirds of all workers engaged in manufacturing, . . . and . . . earn[ed] about four-fifths of all [industrial] profits.”²⁰ Indeed, “[t]hree or four corporations generally dominate most industries.”²¹

The growth of the modern corporation has continued through mergers and acquisitions, leading to increasingly complex organizational structures.²²

18. FRIEDRICHS, *supra* note 10, at 55–59 (tracing the historical development of the corporation and corporate crime).

19. *Id.* at 55. *Contra* RICHARD D. HARTLEY, CORPORATE CRIME: A REFERENCE HANDBOOK 6 (2008) (placing the founding of the East India Company in 1602).

20. MARSHALL B. CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER 2 (1990).

21. *Id.* at 3.

22. HARTLEY, *supra* note 19, at 13–14; CHARLES DERBER, CORPORATION NATION: HOW CORPORATIONS ARE TAKING OVER OUR LIVES AND WHAT WE CAN DO ABOUT IT 11–12, 74–80 (1998) (observing that “[t]he years from 1994 to 1998 set successive records as the biggest merger years in American history”).

The General Electric Company (GE), for example, is a company that has grown through extensive mergers and acquisitions. Founded by Thomas Edison in 1876 with a single laboratory in New Jersey, today GE is one of the world’s largest companies based on market capitalization. FT US 500 2008, Fin. Times (Mar. 31, 2008), <http://media.ft.com/cms/186442b8-41db-11dd-a5e8-0000779fd2ac.pdf>. GE was actually formed by the merger of Edison General Electric and Thomson-Houston Company in 1892. GE, Thomas Edison & GE, <http://www.ge.com/company/history/edison.html> (last visited July 14, 2010). Today GE is a multinational and multi-business organization, comprised of several business units that include infrastructure, industrial, finance, media, healthcare, and consumer finance. See GE, GE Company Organization Chart, http://www.ge.com/pdf/company/ge_organization_chart.pdf (last visited July 14, 2010); GE, Our Company, <http://www.ge.com/company/index.html> (last visited July 14, 2010).

Tyco Inc., for example, was formed as an investment and holding company in 1960. Tyco, Who We Are, <http://www.tyco.com/wps/wcm/connect/tyco+who+we+are/Who+We+Are/History/> (last visited July 14, 2010) [hereinafter Tyco]. From 1973 through 2001, Tyco pursued an aggressive strategy of “[g]rowth through [a]cquisitions,” acquiring twenty-four companies, with eighteen of those acquired from 1995 to 2005. *Id.* Tyco gained notoriety when its former CEO, Dennis Kozlowski, was convicted in 2005 for misappropriating more than \$400 million of the company’s funds to support an extravagant lifestyle. Krysten Crawford, Ex-Tyco CEO Kozlowski Found Guilty, CNNMoney.com (June 21, 2005), http://money.cnn.com/2005/06/17/news/newsmakers/tyco_trialoutcome/index.htm. By 2007, Tyco completed a separation into three different companies, Tyco Healthcare (now Covidien), Tyco Electronics, and Tyco International Ltd. Tyco, *supra*. In 2009, Tyco International Ltd. moved its company’s domicile from Bermuda to Switzerland. *Id.* It presently operates in all 50 states and in more than 60 countries worldwide. Tyco, Who We Are,

These conglomerates “cross-subsidize, meaning they can sustain one business with the profits from another.”²³ Today, many corporations have become conglomerates, forming holding companies and subsidiaries with a variety of product lines, and wielding “political as well as economic [power] that extends well beyond that of the traditional large corporation operating in a single product line.”²⁴ Multinational corporations have ridden the wave of

Tyco Worldwide, <http://www.tyco.com/wps/wcm/connect/tyco+who+we+are/Who+We+Are/Tyco+Worldwide/> (last visited July 14, 2010).

Another example is Altria Group, Inc., which is the parent company and owns 100% of Philip Morris USA, U.S. Smokeless Tobacco Company, John Middleton, Ste. Michelle Wine Estates, and Philip Morris Capital Corporation. ALTRIA GROUP, INC., ANNUAL REPORT (2009) http://investor.altria.com/phoenix.zhtml?c=80855&p=irol-irhome&src=top_nav (scroll to “Shareholder Information” and click “PDF” link to “2009 Annual Report”). Altria also holds a 28.5% economic and voting interest in SABMiller plc. *Id.* Altria acquired Kraft Foods, Inc. in 1988 and Nabisco in 2000, merging Kraft and Nabisco. Brad Dorfman, Altria Sets Kraft Spinoff for March 30, Reuters (Jan. 31, 2007), <http://www.reuters.com/article/idUSWEN324120070131>. Altria would later spin off Kraft, and Nabisco is today a subsidiary of Kraft. Kraft Foods, Nabisco, <http://www.kraftfoodscompany.com/Brands/largest-brands/brands-N/nabisco.aspx> (last visited July 14, 2010). Altria Group, Inc. was formerly known as Philip Morris Companies Inc. until it rebranded its name in 2003; in 2008, it spun off 100% of the shares of Philip Morris International to separate the international tobacco operations from the U.S. tobacco operations and clear the international business from United States legal and regulatory restraints. *See* Altria to Spin-Off Philip Morris Unit, CBSNews.com (Aug. 29, 2007), <http://www.cbsnews.com/stories/2007/08/29/business/main3216427.shtml>. Philip Morris International operates in 160 countries with headquarters in Lausanne, Switzerland. *Id.* Altria Group, Inc. today is considered, according to *Fortune* magazine, the most-admired tobacco company. Geoff Colvin, *World’s Most Admired Companies*, FORTUNE, Mar. 16, 2009, at 75.

23. HARTLEY, *supra* note 19, at 14.

24. CLINARD, *supra* note 20, at 5; *see also* HARTLEY, *supra* note 19, at 13–14. Clinard traced the growth of America’s *Fortune 500* and the contraction of competition in major industries through mergers and consolidations, and considered the expansion into international markets. CLINARD, *supra* note 20, at 2–6. He further connected the contributions of corporations and industry political action committees (PACs) to the democratic process. *Id.* at 6–7. The McCain–Feingold Act is bipartisan legislation designed to address the concern over the political influence wielded by these large conglomerates through political campaign contributions. Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). One of the most important provisions of McCain–Feingold is the prohibition of unregulated political donations or “soft money” to parties or campaigns (“hard money” is regulated contributions to political parties or campaigns). 2 U.S.C. § 441i(a)(1) (Supp. 2002). McCain–Feingold was intended to close the loophole that had allowed corporations to give unlimited and unregulated amounts of “soft money” for so-called party-building activities, recognizing that large corporations and wealthy individuals could exert considerably more influence during campaigns simply by virtue of their ability to give more money. Albert R. Hunt, *McCain–Feingold Did Its Job*, WALL ST. J., Nov. 18, 2004, at A19 (“[T]he declared purpose of McCain–Feingold . . . was to curb the corrupting nexus of big money and federal candidates . . .”).

In *Citizens United v. Federal Election Comm’n*, the Supreme Court stated that “we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S. Ct. 876, 909, 913 (2010) (5–4 decision overruling the Court’s earlier decisions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 203–09 (2003), that had upheld Bipartisan Campaign Finance Reform Act § 203 and 2 U.S.C. § 441b, and invalidating the Act’s “prohibition on the use of corporate treasury funds for express advocacy” and its “restrictions on

globalization by moving manufacturing jobs outside the U.S. border, and supporting NAFTA and other free trade agreements that permit the free flow of goods and services,²⁵ while allowing these entities to take advantage of favorable legal conditions.²⁶

B. A Brief History of Corporate Crime

Several United States Supreme Court decisions are critical to understanding the legal authority and rights of modern corporations. In 1819, the Court denied states' rights to amend corporate charters.²⁷ In 1886, the Court used the Fourteenth Amendment²⁸ to grant personhood to corporations, and afforded a corporation the right to own property and to enter binding contracts.²⁹ This decision represented a further expansion of corporate rights,

corporate independent expenditures"). In a vigorous dissent joined by three other Justices, Justice Stevens cited the extensive record in *McConnell* in affirming the Bipartisan Campaign Finance Reform Act, and traced Congress's concern with corporate influence over political campaigns back as early as 1907, in the passage of the Tillman Act, which banned corporate contributions to candidates. *Citizens United*, 130 S. Ct. at 929, 930–31, 954–57 (Stevens, J., dissenting) (recounting the history of corporate spending limits in political campaigns).

25. NAFTA is a trilateral trade agreement among the United States, Canada, and Mexico whose objective is to eliminate trade barriers and facilitate cross-border movement of goods and services. North American Free Trade Agreement, U.S.-Can.-Mex., art. 102(1), Dec. 17, 1992, 32 I.L.M. 289 (1993).

26. See HARTLEY, *supra* note 19, at 14 (regarding favorable legal conditions); U.S. GOV'T ACCOUNTABILITY OFFICE, REP. TO CONG. REQUESTORS, INTERNATIONAL TAXATION: LARGE U.S. CORPORATIONS & FEDERAL CONTRACTORS WITH SUBSIDIARIES IN JURISDICTIONS LISTED AS TAX HAVENS OR FINANCIAL PRIVACY JURISDICTIONS 4 (2008) (reporting that 83 of the 100 largest U.S. corporations have subsidiaries in tax havens or international financial privacy jurisdictions). See also Press Release, Remarks by the President on Int'l Tax Policy Reform (May 4, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-International-Tax-Policy-Reform/ (announcing proposals to "crack down on illegal overseas tax evasion, close loopholes, and make it more profitable for companies to create jobs here in the United States," and to ensure that companies are not rewarded "for moving jobs off our shores or transferring profits to overseas tax havens"); Press Release, Leveling the Playing Field: Curbing Tax Havens and Removing Tax Incentives for Shifting Jobs Overseas (May 4, 2009), available at http://www.whitehouse.gov/the_press_office/LEVELING-THE-PLAYING-FIELD-CURBING-TAX-HAVENS-AND-REMOVING-TAX-INCENTIVES-FOR-SHIFTING-JOBS-OVERSEAS/ (detailing the Obama Administration's tax proposals aimed at raising \$210 billion over the next ten years, in part by removing tax advantages for investing overseas); *supra* note 22 (discussing Altria Group, Inc.'s spin-off of Philip Morris International).

27. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 712 (1819).

28. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

29. *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (refusing to hear argument on the issue because the Court had already concluded that the Fourteenth Amendment—which was a human rights measure adopted to address slavery—applied to corporations); see HARTLEY, *supra* note 19, at 8.

found in 1830 “to be similar to those of natural persons.”³⁰ Key among these rights is the right of free speech, which underlies a corporation’s ability to support political initiatives.³¹ Responsibilities came along with the rights. Corporations could be required to pay taxes,³² and in 1909, the Court concluded that corporations could be held criminally liable for the acts of its agents:³³

It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.³⁴

Actions done by employees during their course of employment may place a corporation at risk of criminal liability, even in circumstances where the employee acted contrary to corporate policy or direction.³⁵ The only time an organization is generally not subject to corporate liability for the criminal acts of employees is when a corporation is “the object of the wrongdoing—instead of a mere vehicle for its perpetration.”³⁶

Crime has tagged along with the corporation, and examples can be found throughout the history of the corporation.³⁷ Indeed, investment bubbles have been identified going back hundreds of years to the South Sea Bubble.³⁸ The Industrial Revolution in the late eighteenth to nineteenth centuries “gave rise

30. HARTLEY, *supra* note 19, at 10; *see also* Soc’y for the Propagation of the Gospel in Foreign Parts v. Town of Pawlet, 29 U.S. (4 Pet.) 480, 503 (1830) (holding that a corporation has the right to own land).

31. Citizens United v. Federal Election Comm’n, 130 S. Ct. 876, 885 (2010) (“[T]he Government may not suppress political speech on the basis of the speaker’s corporate identity”); First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1979) (implying a corporation’s right to political speech under the First Amendment).

32. *See Santa Clara County*, 118 U.S. at 396; HARTLEY, *supra* note 19, at 8.

33. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909).

34. *Id.*

35. MORGAN LEWIS, CORPORATE INVESTIGATIONS & WHITE COLLAR DESKBOOK 12-2 (2006).

36. 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 4.01, at 131 (2d ed. 1984).

37. *See* CULLEN ET AL., *supra* note 14, at 13–17, 19–23 (recounting well-known criminology studies into the breadth of corporate crime in the United States, and major corporate crime scandals of the past half-century); HARTLEY, *supra* note 19, at 6–12.

38. FRIEDRICHS, *supra* note 10, at 55–56 (“The South Sea Company was chartered in London in 1711 to engage in slave trade and commerce Investors lost large fortunes because the enterprise was fraudulent, driven by bribery, false financial statements, and stock manipulation.”) (citation omitted).

to [the] powerful and wealthy capitalist corporations.”³⁹ Corporate empires of the robber barons,⁴⁰ who dominated their industries and amassed huge fortunes during the second half of the nineteenth century, were involved in every manner of bribery, stock manipulation, predation against competitors, price gouging, exploitation of labor, and maintenance of unsafe working conditions; corporations became “largely invulnerable to legal controls.”⁴¹ In the late nineteenth century, trusts⁴² engaged in monopolistic practices, which were addressed by the passage and enforcement of the Sherman Act, which prohibited agreements in restraint of trade.⁴³ During the early part of the twentieth century, corporations grew into national entities.⁴⁴ In the post-World War II era, “mergers, the formation of conglomerates, corporate takeovers, and the growth of transnational or multinational corporations have been characteristic of corporate development.”⁴⁵

Corporate structure makes it difficult to effectively punish corporations because of the socialization of risk⁴⁶ and political influence.⁴⁷ The size of

39. *Id.* at 56; *see also* HARTLEY, *supra* note 19, at 6–12 (tracing the history of corporate growth in the United States).

40. FRIEDRICHS, *supra* note 10, at 56 (naming as examples John D. Rockefeller, Cornelius Vanderbilt, Jay Gould, Andrew Carnegie, and Henry Clay Frick).

41. *Id.* (citation omitted).

42. *Id.* (describing trusts as “holding companies for a chain of corporations”).

43. *Id.*; 15 U.S.C. § 1 (2006).

44. FRIEDRICHS, *supra* note 10, at 56.

45. *Id.*; HARTLEY, *supra* note 19, at 13–14; DERBER, *supra* note 22, at 72–75, 79, 81–90.

46. FRIEDRICHS, *supra* note 10, at 59. Risk and reward, all things being equal, are in proportion. The more risk undertaken, the greater the possibility for reward and the greater the possibility for loss. When risk is socialized or guaranteed by the taxpayer, however, the potential outcomes are disproportional, at least with respect to the corporations. Corporations are encouraged to engage in even greater risks for even greater rewards, recognizing that they will not fully bear the greater risk. When corporations understand that the U.S. taxpayer will bail out, guarantee, and socialize their risks, a moral hazard is created because corporations lose the incentive to properly identify and mitigate risk. *Cf.* Tim Geithner, *My Plan for Bad Bank Assets*, WALL ST. J., Mar. 23, 2009, at A15. United States Treasury Secretary Geithner discusses “too big to fail” themes in explaining the U.S. government’s plan to bail out major banks and other corporate institutions, remarking that “[o]ur nation deserves better choices than . . . being forced to pour billions of taxpayer dollars into an institution like AIG to protect the economy against that scale of damage.” *Id.*

The U.S. Department of Justice considers the collateral consequences in pursuing a corporate conviction on others, including “tak[ing] into account the possibly substantial consequences to a corporation’s employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it.” U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.100 (2008) [hereinafter U.S. ATTORNEYS’ MANUAL], http://www.justice.gov/usao/eousa/foia_reading_room/usam/ (click on “Title 9,” then “9-28.000,” followed by “9-28.100”).

47. *See* HARTLEY, *supra* note 19, at 60–62; CLINARD, *supra* note 20, at 6–7; Irwin Ross, *How Lawless Are Big Companies?*, FORTUNE, Dec. 1, 1980, at 56–70, *reprinted in* CORPORATE & WHITE COLLAR CRIME: AN ANTHOLOGY 114 (Leonard Orland ed. 1995) (listing 188 citations of criminal

current multinational corporations, upon which jobs depend, creates political and economic resistance to criminal conviction.⁴⁸

III. CURRENT NATIONAL APPROACH TO CORPORATE CRIME FIGHTING

Presently, the United States pursues corporate crime through several avenues, and federal criminal prosecutions are pursued exclusively through the United States Department of Justice (DOJ). The DOJ is led by the U.S. Attorney General, who is appointed by the President.⁴⁹ The Attorney General sits at the top of the DOJ organizational chart and is served by a Deputy Attorney General.⁵⁰ Below those two positions is a sprawling series of offices and divisions that execute the responsibilities of the DOJ, including the litigating divisions of the DOJ that are designated to particular missions.⁵¹ Each division is headed by an Assistant Attorney General, who reports either to the Deputy Attorney General or the Associate Attorney General.⁵² The

conduct by corporations between 1970 and 1980, including 28 instances of kickbacks, bribery, or illegal rebates, and 21 instances of illegal political contributions); Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability*, 47 ARIZ. L. REV. 933, 966–70 (2005).

48. See U.S. ATTORNEYS' MANUAL, *supra* note 46, at § 9-28.100; Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 165–66 (2008) (discussing Arthur Andersen's criminal indictment and the collateral consequences to the thousands of employees as highlighting the need for alternatives "somewhere in between the 'all-or-nothing choice' between indicting (and destroying) a company and giving it a complete 'pass.'"); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 3 n.8 (2006) (discussing the fallout from the prosecution of Arthur Andersen).

Both Republicans and Democrats receive nearly equal political funding from major corporations and industries. See Opensecrets.org, Pharmaceuticals/Health Products: Long-Term Contribution Trends, <http://www.opensecrets.org/industries/indus.php?ind=H04> (last visited July 14, 2010). In 2008, pharmaceutical companies provided 50% political funding to Democrats and 50% to Republicans, *id.*, while the defense industry and the finance industry provided campaign funding of 51% to Democrats and 49% to Republicans. Opensecrets.org, Defense: Long-Term Contribution Trends, <http://www.opensecrets.org/industries/indus.php?ind=D> (last visited July 14, 2010); Opensecrets.org, Finance/Insurance/Real Estate: Long-Term Contribution Trends, <http://www.opensecrets.org/industries/indus.php?ind=F> (last visited July 14, 2010).

49. 28 U.S.C. § 503 (2006) ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States.").

50. U.S. DEP'T OF JUSTICE, ORGANIZATION, MISSION AND FUNCTIONS MANUAL: DOJ ORGANIZATIONAL CHART (2010), <http://www.justice.gov/jmd/mps/manual/ag.htm#orgchart> [hereinafter DOJ ORGANIZATIONAL CHART].

51. *Id.* The litigating divisions include the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, National Security Division, and Tax Division. *Id.*; U.S. DEP'T OF JUSTICE, OFFICE OF ATT'Y RECRUITMENT & MGMT., A CAREER COUNSELOR'S GUIDE TO LATERAL HIRING AT DOJ 8 (2008), <http://www.justice.gov/oarm/images/lateralhiringguideforweb.pdf>.

52. DOJ ORGANIZATIONAL CHART, *supra* note 50. The Criminal Division, Justice Management Division, and National Security Division report to the Deputy Attorney General, and the Antitrust Division, Civil Division, Civil Rights Division, Environment and Natural Resources Division, and Tax Division report to the Associate Attorney General. *Id.*

U.S. Attorney's Office is a litigating arm of the DOJ that maintains offices in ninety-four federal judicial districts located throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.⁵³ The DOJ includes an Executive Office for U.S. Attorneys with a director, who coordinates policy among the ninety-three offices.⁵⁴

A. Structural Responsibility for Corporate Crime Fighting

One of the five statutory responsibilities of the U.S. Attorneys' Offices is the prosecution of criminal cases on behalf of the federal government.⁵⁵ The U.S. Attorneys are appointed by and serve at the discretion of the President of the United States, with the advice and consent of the U.S. Senate.⁵⁶ Although caseloads vary among the offices of the U.S. Attorneys, all offices are responsible for prosecuting criminal cases, and the U.S. Attorney for the judicial district is considered the chief prosecuting attorney for the United States within that judicial district.⁵⁷ Despite the resource-taxing complexity of the investigations and prosecutions, the U.S. Attorneys' Offices have played a significant role in fighting corporate crime.⁵⁸

Of the DOJ divisions, six have responsibilities in investigating and prosecuting United States criminal laws: the Criminal Division, the Antitrust Division, the Civil Rights Division, the Environment and Natural Resources

53. See United States Department of Justice, United States Attorneys Mission Statement, <http://www.justice.gov/usao/> (last visited July 15, 2010) [hereinafter Mission Statement]; U.S. DEP'T OF JUSTICE, ORGANIZATION, MISSIONS AND FUNCTIONS MANUAL: EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS (2010), <http://www.justice.gov/jmd/mps/manual/eousa.htm#fieldmap>. 28 U.S.C. § 541(a) states, "The President shall appoint . . . a United States attorney for each judicial district." There are ninety-three U.S. Attorneys and ninety-four judicial districts; a single U.S. Attorney is assigned to Guam and the Northern Mariana Islands. United States Department of Justice, United States Attorneys' Offices Contact Information, <http://www.justice.gov/usao/offices/index.html#g> (last visited July 15, 2010); Melissa McNamara, The Role of U.S. Attorneys, CBSNews.com (Mar. 19, 2007), <http://www.cbsnews.com/stories/2007/03/19/fyi/main2583739.shtml>.

54. See United States Department of Justice, United States Attorney's Office, Mission and Functions, <http://www.justice.gov/usao/eousa/mission.html> (last visited July 15, 2010).

55. 28 U.S.C. § 547 (2006). The offices are also responsible for representing the interests of the United States in civil cases, and for collecting its debts. *Id.*

56. *Id.*; U.S. CONST. art. 2, § 2, cl. 2: "[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . other public Ministers and Consuls, . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

57. See Mission Statement, *supra* note 53.

58. See U.S. DEP'T OF JUSTICE, CORPORATE FRAUD TASK FORCE 2008, REPORT TO THE PRESIDENT 1.5–1.14 (2008), <http://www.justice.gov/archive/dag/cftf/corporate-fraud2008.pdf> [hereinafter CORPORATE FRAUD TASK FORCE 2008 REPORT]; U.S. DEP'T OF JUSTICE, NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT 6–12 (2008), <http://www.justice.gov/criminal/nptf/pr/speeches-testimony/2008/12-08progress-report.pdf> [hereinafter NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT].

Division, the National Security Division, and the Tax Division.⁵⁹ Aside from the Criminal Division, each of these divisions' prosecutorial responsibilities address limited areas of law. The Antitrust Division enforces various criminal statutes related to Sherman Act violations or "prosecute[s] offenses that affect the integrity of [the related] investigatory process."⁶⁰ The National Security Division, the most recently added division to the DOJ, investigates and prosecutes "international and domestic terrorism" cases.⁶¹ The Criminal Division, however, exercises general supervision over the enforcement of "all federal criminal laws except those specifically assigned to other divisions."⁶²

The Criminal Division is responsible for formulating and implementing criminal enforcement policy.⁶³ Additionally, the division is responsible for "advise[ing] the Attorney General, Congress, the Office of Management Budget and the White House on matters of criminal law."⁶⁴ The division provides leadership and also coordinates international, federal, state, and local law enforcement matters.⁶⁵ Although the Criminal Division has seventeen separate sections,⁶⁶ one key responsibility is particularly related to the proposed Corporate Crimes Division. The responsibilities of the Fraud Section include the following: investigating and prosecuting sophisticated and multidistrict white-collar crimes such as corporate, securities, and investment fraud, government program and procurement fraud, and international criminal violations; developing department policy; and training, advising, and mentoring its attorneys and other professionals.⁶⁷ These responsibilities would aptly fit the focus of the proposed Corporate Crimes Division.

59. See U.S. ATTORNEYS' MANUAL, *supra* note 46.

60. U.S. DEP'T OF JUSTICE, ANTITRUST DIV., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL (2005), <http://www.justice.gov/atr/public/guidelines/209114.htm>.

61. United States Department of Justice, National Security Division, Mission and Functions, http://www.justice.gov/nsd/mission_functions.htm (last visited July 15, 2010) [hereinafter Mission and Functions].

62. Criminal Division Homepage, *supra* note 7. Certain divisions, such as the Antitrust, Civil Rights, Environment and Natural Resources, and Tax Divisions, have authority to apply and enforce specific statutes assigned to those divisions.

63. *Id.*

64. *Id.*

65. *Id.*

66. United States Department of Justice, Criminal Division Organization Chart, <http://www.justice.gov/criminal/about/orgchart.html> (last visited July 15, 2010) [hereinafter Criminal Division Organization Chart]. The Criminal Division's major responsibilities are wide-ranging: counterterrorism, public integrity, domestic security, fraud, child exploitation, computer crime and intellectual property crime, narcotics and dangerous drugs, organized crime drug enforcement, organized crime, sensitive investigative techniques, special investigations, international affairs, assistance to foreign law enforcement institutions, policy and legislation, and appellate work. See *id.*

67. See United States Department of Justice, Criminal Division, Fraud Section, <http://www.justice.gov/criminal/fraud/> (last visited July 15, 2010).

Presently, the DOJ has several task forces dedicated to or substantially related to corporate crime. The task forces coordinate efforts among the Attorney General, relevant Assistant Attorneys General (e.g., Criminal and Tax Divisions), relevant agencies (e.g., Federal Bureau of Investigation), offices (e.g., Homeland Security Office), and U.S. Attorneys. One such task force is the Financial Fraud Enforcement Task Force, whose stated purpose is strengthening the investigation and prosecution of significant financial crimes, recovering the proceeds, and ensuring just punishment of the perpetrators.⁶⁸ In addition to other DOJ officials that the Attorney General may designate, the members of the task force are designated by Executive Order to include senior-level officials from various federal departments (e.g., Justice, Treasury, Commerce, Labor), agencies (e.g., the SEC, the Commodity Futures Trading Commission, the Federal Trade Commission), and offices (e.g., Thrift Supervision, Comptroller of the Currency, relevant Offices of Inspectors General).⁶⁹ Chaired by the Attorney General,⁷⁰ the responsibilities of the Financial Fraud Enforcement Task Force include “provid[ing] advice . . . for the investigation and prosecution of [significant] cases of bank, mortgage, loan, and lending fraud; securities and commodities fraud; retirement plan fraud; mail and wire fraud; tax crimes; money laundering; False Claims Act violations; unfair competition; discrimination; and other financial crimes and violations.”⁷¹ The Financial Fraud Enforcement Task Force has a narrower scope than its predecessor Corporate Fraud Task Force in that it does not have the additional responsibilities of recommending to the Attorney General the

68. Exec. Order No. 13,519, 74 Fed. Reg. 60,123 (Nov. 17, 2009) (establishing the task force “in order to strengthen the efforts of the Department of Justice, in conjunction with [others], to investigate and prosecute significant financial crimes and other violations relating to the current financial crisis and economic recovery efforts, recover the proceeds of such crimes and violations, and ensure just and effective punishment of those who perpetrate financial crimes and violations”). The Financial Fraud Enforcement Task Force replaced and continues the work of the Corporate Fraud Task Force established by Exec. Order No. 13,271, 3 C.F.R. 245–47 (2003). Exec. Order No. 13,519, 74 Fed. Reg. at 60,125. The Corporate Fraud Task Force was created in the summer of 2002 to address public demand for a response to the collapse of Enron and WorldCom, in the face of growing revelations of pervasive corporate accounting fraud. *See* Ramirez, *supra* note 47, at 956. Market confidence continued to plummet during July 2002, resulting in the passage of the Sarbanes–Oxley Act of 2002. *Id.* at 956 n.130; Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). Like the Financial Fraud Enforcement Task Force, the Corporate Fraud Task Force’s stated purpose was to “strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes.” Exec. Order No. 13,271, 3 C.F.R. at 245.

69. Exec. Order No. 13,519, 74 Fed. Reg. at 60,123–24. The order also provides for coordination with state, local, tribal, and territorial law enforcement. *Id.* at 60,124.

70. *Id.* at 60,123.

71. *Id.* at 60,124. The Deputy Attorney General is tasked with designating the crimes as “significant.” *Id.*

allocation of resources, and recommending to the Attorney General and Congress “changes in rules, regulations or policy to improve the effective investigation and prosecution of significant financial crimes.”⁷² The responsibilities identified in the formation of the Corporate Fraud Task Force would be at the core of a Corporate Crimes Division, except with the added charge to conduct the investigation and prosecution of significant corporate financial crimes cases.

Other task forces created to address corporate crime include the Enron Task Force, the Options Backdating Task Force, the National Procurement Fraud Task Force, and the Health Care Fraud Prevention and Enforcement Action Team. The Enron Task Force was part of the Corporate Fraud Task Force⁷³ and was formed to investigate and prosecute allegations of fraud and corruption in connection with the collapse of Enron, a multinational energy corporation based in Houston, Texas, which filed for bankruptcy in 2001.⁷⁴ At the time, the Enron bankruptcy was the most extensive and expensive bankruptcy ever filed.⁷⁵ In July 2006, the FBI formed part of an Options Backdating Task Force, in conjunction with federal prosecutors.⁷⁶

The National Procurement Fraud Task Force was formed in October 2006 “to promote the prevention, early detection, and prosecution of procurement

72. *Id.*; Exec. Order No. 13,271, 3 C.F.R. at 246. Another distinction between the Financial Fraud Enforcement Task Force and the Corporate Fraud Task Force is that the membership of the Financial Fraud Enforcement Task Force focuses on the various federal departments, agencies, and offices listed in the Executive Order, whereas the Corporate Fraud Task Force membership included many agencies and offices, but also identified particular U.S. Attorneys’ Offices in which a large number of financial crimes were investigated and prosecuted. The members of the [corporate fraud] task force are designated by Executive Order to include the Deputy Attorney General, the Assistant Attorneys General for the Criminal Division and the Tax Division, the Director of the Federal Bureau of Investigation, and the United States Attorneys for the Southern District of New York, the Eastern District of New York, the Northern District of Illinois, the Eastern District of Pennsylvania, the Central District of California, the Northern District of California, and the Southern District of Texas. Exec. Order No. 13,271, 3 C.F.R. at 245–46.

73. Press Release, U.S. Dep’t of Justice, Former Enron Vice President Christopher Calger Pleads Guilty to Conspiracy and Agrees to Cooperate (July 14, 2005), *available at* <http://www.fbi.gov/dojpressrel/pressrel05/calger071405.htm>.

74. *See* Press Release, U.S. Dep’t of Justice, Federal Jury Convicts Former Enron Chief Executives Ken Lay, Jeff Skilling on Fraud, Conspiracy and Related Charges (May 25, 2006), *available at* <http://www.usdoj.gov/enron/pdf/layskillingverdictfinalpr.pdf>.

75. *See* Ramirez, *supra* note 47, at 955–56 nn.125 & 128; Tammy Williamson, *Largest Bankruptcies*, CHI. SUN-TIMES, Dec. 9, 2002, at 8; *see generally* PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., THE ROLE OF THE BOARD OF DIRECTORS IN ENRON’S COLLAPSE (Comm. Print 2002), *available at* <http://news.findlaw.com/hdocs/docs/enron/senpsi70802rpt.pdf>.

76. Press Release, Fed. Bureau of Investigation, Corporate Fraud: Options Cases Aim for Level Field (Feb. 14, 2007), *available at* <http://www.fbi.gov/page2/feb07/options021407.htm> [hereinafter Corporate Fraud: Options Cases] (noting that at the time of this press release, 61 of the 492 pending cases in corporate fraud involved options backdating).

and grant fraud.”⁷⁷ Chaired by the Assistant Attorney General for the Criminal Division, this task force includes representatives of the Civil, Criminal, Antitrust, and Tax Divisions of the DOJ, in addition to federal prosecutors from the U.S. Attorneys’ Offices in various districts and inspectors general from various federal agencies.⁷⁸ The task force is “designed to leverage the resources of the Federal law enforcement community by partnering with the I[nspectors] G[eneral] and other law enforcement agencies.”⁷⁹ In its first two years of existence, the task force promoted legislation to strengthen procurement fraud investigations,⁸⁰ and developed training initiatives to educate and share expertise in procurement fraud detection, investigation, and prosecution with auditors, investigators, prosecutors, and procurement specialists throughout the country.⁸¹

The DOJ is also a member of the International Contract Corruption Task Force that “deploys criminal investigative and intelligence assets worldwide to detect and investigate corruption and contract fraud” related to the Global War on Terrorism.⁸² Established in October 2006, this task force is not under the direction of the DOJ, but rather is a joint agency task force “led by a Board of Governors composed of senior agency representatives” involved in defending the interests of the United States overseas.⁸³ These complex, resource-intensive cases involve foreign, extraterritorial and domestic coordination, and at times involve military and civilian cooperation in active combat zones.⁸⁴

The Health Care Fraud Prevention and Enforcement Action Team is another task force expanded by the Obama Administration to “help detect and prevent health-care fraud.”⁸⁵ In 2007, the DOJ and Department of Health and

77. United States Department of Justice, National Procurement Fraud Task Force, <http://www.justice.gov/criminal/npftf/> (last visited July 15, 2010). The task force tracks federal civil and criminal procurement fraud cases. NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT, *supra* note 58, at 5. Between October 2006 and December 2008, the task force tracked over 400 civil and criminal cases, involving the DOJ’s Criminal, Civil, and Antitrust Divisions, and forty-five U.S. Attorneys’ Offices, as well as numerous investigative agencies and offices. *Id.* at 5–18. The task force is a response to a call for greater oversight of the nongovernment contractor hired to aid the war effort. *See, e.g.*, John Esterbrook, Halliburton to Pay Pentagon \$6.3M, CBSNews.com (Jan. 23, 2004), <http://www.cbsnews.com/stories/2004/01/23/iraq/main595277.shtml>.

78. *See* NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT, *supra* note 58, at 1, 5–6.

79. *Id.* at 1.

80. *Id.* at 2–3.

81. *Id.* at 3.

82. *Id.* at 13.

83. *Id.*

84. *Id.*

85. *See* Carrie Johnson, *Health-Care Fraud to be Targeted*, WASH. POST, May 21, 2009, at A4 (announcing expansion of the strike force teams to Detroit and Houston). The task force is composed

Human Services launched the Medicare Fraud Strike Force.⁸⁶ The DOJ's Criminal Division Fraud Section and U.S. Attorneys' Offices lead the strike force teams in combating fraudulent Medicare billing.⁸⁷

In addition to task forces, the Criminal Division Fraud Section leads or partners with U.S. Attorneys' Offices, the FBI, and other interested agencies in national and regional working groups related to financial crimes, including a Securities and Commodities Fraud Working Group, a Bank Fraud Enforcement Working Group, and various Mortgage Fraud Working Groups.⁸⁸ Such working groups may even include international efforts to coordinate and prosecute financial crimes.⁸⁹

The Financial Crimes Section of the FBI is the primary unit in the DOJ tasked with investigating financial crimes such as "corporate fraud, securities and commodities fraud, health care fraud, financial institution fraud, mortgage

of senior-level officials at the DOJ and the Department of Health and Human Services. *Id.* Since 1997, the DOJ has coordinated with the Department of Health and Human Services to combat health care fraud, through the National Health Care Fraud and Abuse Control program, which uses federal, state, and local resources pursuant to the Health Insurance Portability and Accountability Act (HIPAA). See Press Release, U.S. Dep't of Justice, Department of Justice Efforts to Combat Health Care Fraud and Abuse (May 28, 2008), available at http://hcca-info.org/Content/NavigationMenu/ComplianceResources/ComplianceNews/DoJ_EffortsCombatHealthCareFraudAbuse.pdf. There were different phases of this strike force effort. *Id.* The Internal Revenue Service also investigates health care fraud tax schemes. See Internal Revenue Service, Examples of Healthcare Fraud Investigations FY2008, <http://www.irs.gov/compliance/enforcement/article/0,,id=174637,00.html> (last visited July 15, 2010).

86. See U.S. DEP'T OF HEALTH & HUMAN SERVICES & U.S. DEP'T OF JUSTICE, HEALTH CARE FRAUD ABUSE CONTROL PROGRAM ANN. REP. FOR FY 2007, at 9 (2008), <http://www.oig.hhs.gov/publications/docs/hcfac/hcfacreport2007.pdf>.

87. *Id.* The task force reported significant activity in enforcement:

In FY 2007, U.S. Attorneys' Offices opened 878 new criminal health care fraud investigations involving 1,548 potential defendants. Federal prosecutors had 1,612 health care fraud criminal investigations pending, involving 2,603 potential defendants, and filed criminal charges in 434 cases involving 786 defendants. A total of 560 defendants were convicted for health care fraud-related crimes during the year. Also in FY 2007, the Department of Justice (DOJ) opened 776 new civil health care fraud investigations, and had 743 civil health care fraud investigations pending at the end of the fiscal year. The Department opened 218 new civil health care fraud cases during the year.

Id. at 1.

88. See U.S. DEP'T OF JUSTICE, CRIMINAL DIV., FRAUD SECTION ACTIVITIES REPORT 5 (2006), <http://www.justice.gov/criminal/fraud/documents/reports/2006/actrpt06.pdf>; Press Release, Fed. Bureau of Investigation, Dallas Div., Mortgage Fraud Background Information (June 19, 2008), available at <http://dallas.fbi.gov/pressrel/pressrel08/dl061908.htm> (reporting on a multiagency nationally coordinated fraud initiative involving forty-one mortgage fraud task forces or working groups and yielding 144 mortgage fraud cases and 406 defendants between March 1, 2008 and June 18, 2008).

89. See U.S. Dep't of Justice, Fraud Section, Interagency Working Groups, <http://www.justice.gov/criminal/fraud/working-grps/> (last visited July 15, 2010).

fraud, insurance fraud, mass marketing fraud, and money laundering.”⁹⁰ Beginning with fiscal year 2003 and through fiscal year 2007, the FBI has participated in corporate criminal cases resulting in 183 indictments and 173 convictions.⁹¹ In 2008, the FBI reported having more than 18,000 pending white-collar cases, of which corporate crimes cases are only one piece.⁹² The FBI’s White-Collar Crime program has set a five-year strategic goal for fiscal years 2007 to 2012, to “[d]ismantle a cumulative total of 745 criminal enterprises engaging in white-collar crime.”⁹³

The membership of the various task forces highlights the breadth of involvement in corporate crime fighting of many agencies within the government and of many branches and divisions within the DOJ. Although the coordination of the agencies is certainly a benefit, the heavy lifting of any criminal case ultimately rests with the litigators who will either press the case through trial or negotiate a plea or other settlement short of trial.

B. Success in National Corporate Crime Fighting

Tracking the success of federal corporate crime fighting is not an easy task because no single accounting is made available.⁹⁴ The DOJ collects statistics from the U.S. Attorneys’ Offices, but it does not maintain a centralized record of corporate fraud cases.⁹⁵ Nevertheless, in 2008 the DOJ reported that since July 2002, when the Corporate Fraud Task Force was established, the DOJ had “obtained nearly 1,300 corporate fraud

90. FED. BUREAU OF INVESTIGATION, FIN. CRIMES REP. TO THE PUBLIC: FISCAL YEAR 2007 (2007), http://www.fbi.gov/publications/financial/fcs_report2007/financial_crime_2007.htm.

91. *Id.* The FBI reported 529 pending corporate fraud cases in fiscal year 2008. *Id.*

92. Corporate Fraud: Options Cases, *supra* note 76. The FBI defines white-collar crime as “those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.” CYNTHIA BARNETT, U.S. DEP’T OF JUSTICE, FBI CRIMINAL JUSTICE INFO. SERVS. DIV., THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 1 (NIBRS Publications Series, n.d.).

93. FY 2008 PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 11, at II-19. “Dismantlement means destroying the organization’s leadership, financial base, and supply network such that the organization is incapable of operating and/or reconstituting itself.” *Id.* at II-20.

94. Zachary Bookman, *Convergences & Omissions in Reporting Corporate & White Collar Crime*, 6 DEPAUL BUS. & COM. L.J. 347, 348 (2008) (observing that even when statistics are kept, the data made available to the public does not include critical information about the precise type of crime (e.g., embezzlement versus broad-based accounting fraud) nor the size of the crime or its economic impact); Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory & Scholarship*, 17 AM. CRIM. L. REV. 501, 509 (1980).

95. Daphne Eviatar, *Case Closed?*, AM. LAW. & CORP. COUNS. (LITIGATION 2007: CORPORATE FRAUD), Fall 2007, at 19 (“[A]ccording to Joan Meyer, senior counsel to the deputy attorney general, [the DOJ] cannot provide a complete list of the cases that were the basis of the victories [Attorney General] Gonzales cited at the July 17[, 2007] anniversary celebration” of the DOJ’s Corporate Fraud Task Force.).

convictions . . . includ[ing] convictions of more than 200 chief executive officers and corporate presidents, more than 120 corporate vice presidents, and more than fifty chief financial officers.”⁹⁶ Although the Corporate Fraud Task Force was created to address the massive accounting frauds discovered with the advent of the Enron bankruptcy filing, the number of convictions does not reveal the size of the corporations nor the extent of the fraudulent conduct.⁹⁷ In 2008, the U.S. Sentencing Commission reported that, of the ninety-five organizations sentenced under the Federal Sentencing Guidelines, forty-four were organizations with ten or fewer employees, and only seven were organizations with over one thousand employees.⁹⁸ Unable to acquire from the DOJ an accounting of the reported 1,300 convictions, *The American Lawyer’s* 2007 independent investigation of the DOJ’s corporate crime fighting compiled a Corporate Fraud Database that included 440 indicted defendants arising out of 124 corporate fraud investigations.⁹⁹ Despite being

96. CORPORATE FRAUD TASK FORCE 2008 REPORT, *supra* note 58, at iii (April 2, 2008, message from the chairman); Press Release, U.S. Dep’t of Justice, President’s Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity (July 17, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html.

97. See Darryl K. Brown, *The Problematic & Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 528 (2004). Professor Brown observes that large, publicly held firms

can afford legal assistance that matches or surpasses the government’s, and they can devise policies to take full advantage of privacy protections—to make as much information as hard to discover as possible. Smaller firms, as a group, have fewer resources with which to optimize privacy, litigate, and otherwise raise the government’s costs of enforcement. This may partly explain why most firms sentenced under the federal sentencing guidelines are small, closely held firms.

Id.

98. See U.S. SENT’G COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.54 (2008), *available at* <http://www.ussc.gov/ANNRPT/2008/Table54.pdf>.

99. See Corporate Fraud Database, AmLaw.com, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1193821435603> (last visited July 15, 2010) (compiled and relied upon by Barker et al., *supra* note 1, at 37, and Eviatar, *supra* note 95, at 20). The DOJ refused to provide *The American Lawyer* with a complete list of corporate fraud cases since 2002, so the publication created its own database “includ[ing] cases cited on the [Corporate Fraud Task Force] Web site and in two published task force reports, as well as corporate fraud prosecutions mentioned in speeches or public comments by Justice Department officials,” and consulted “publicly available case records and performance statistics, as well as interviews with dozens of current and former prosecutors, task force members, and white-collar criminal defense lawyers.” Eviatar, *supra* note 95, at 20. Professor Kathleen Brickey has also been tracking major corporate fraud prosecutions, and has examined her findings in several articles. Kathleen F. Brickey, *In Enron’s Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397, 401, 420–33 (2006) [hereinafter Brickey, *In Enron’s Wake*] (examining corporate fraud prosecutions related to seventeen major companies and firms, and reporting that forty-six defendants at those companies had gone to trial, covering twenty-three prosecutions between March 2002 and January 2006); Kathleen F. Brickey, *Enron’s Legacy*, 8 BUFF. CRIM. L. REV. 221, 246 (2004) [hereinafter Brickey, *Enron’s Legacy*] (tracking nineteen major companies involving sixty-nine prosecutions and over 125 defendants between March 2002 and July 2004); Kathleen F. Brickey, *From Enron to WorldCom*

borne of a crisis of confidence in our corporations brought on by the collapse of Enron, WorldCom, and other previously well-respected corporations, the task force “had no prosecutorial staff or budget of its own,” and “U.S. Attorneys’ offices were not given additional staff to prosecute corporate fraud cases.”¹⁰⁰ Once formed, however, the Corporate Fraud Task Force appears to have spurred local U.S. Attorneys’ Offices to pursue corporate crime, at least initially.¹⁰¹

The success of corporate crime fighting efforts has been scrutinized to evaluate the government’s commitment to pursuing corporate criminals and to assess its tactics. Of the 440 cases tracked by *The American Lawyer*, 57% of those defendants pled guilty, and 21% of the cases that went to trial ended in acquittals.¹⁰² Moreover, over fifty convictions resulted in sentences of imprisonment of greater than five years.¹⁰³ In Professor Kathleen Brickey’s 2004 study of nineteen companies involving 125 defendants, seventy-three of eighty-nine convictions (about 82%) were by guilty plea.¹⁰⁴ But by 2006, less than half of the defendants in the study pled guilty.¹⁰⁵ Moreover, throughout the Brickey study, results from criminal trials of defendants were mixed with eighteen convictions, eleven acquittals, and fifteen deadlocks.¹⁰⁶ The *American Lawyer* Corporate Fraud Database indicates that twenty-seven defendants were acquitted at trial, twenty-eight cases were dismissed, twenty-two cases were declared mistrials, and nine convictions were reversed on

and Beyond: Life and Crime After Sarbanes–Oxley, 81 WASH. U. L.Q. 357, 358 app. A at 382 (2003) (explaining that between March 2002 and August 2003, over ninety defendants were criminally charged).

100. Eviatar, *supra* note 95, at 24, 30. *The American Lawyer* reports that the U.S. Attorney’s Office for the Southern District of New York in Manhattan “actually lost about \$5 million in personnel and other assistance from the SEC” during the 2002-to-2007 time period, although the DOJ would not confirm this information. *Id.* at 24. One of the lead prosecutors in the trial of Enron Chairman Ken Lay and CEO Jeffrey Skilling acknowledged a “lack of resources, both technical and in terms of personnel,” including the lack of resources to even “create a searchable electronic database of Enron documents until shortly before trial.” *Id.* But see Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 379 (2008) (citing Alice Fisher et al., *Encouraging Corporate Responsibility Through Criminal Enforcement*, in 3 THE PRACTITIONER’S GUIDE TO THE SARBANES–OXLEY ACT, at VII-1-2 (John J. Huber et al. eds., 2006) (“With the Task Force came a \$24.5 million increase in the DOJ’s budget for corporate fraud investigations and a 73% budget increase for the SEC.”)).

101. See Eviatar, *supra* note 95, at 20.

102. See Barker et al., *supra* note 1, at 37.

103. See Eviatar, *supra* note 95, at 20.

104. See Brickey, *In Enron’s Wake*, *supra* note 99, at 403 tbl.2 (reporting on results from earlier study addressed in Brickey, *Enron’s Legacy*, *supra* note 99, at 246).

105. Brickey, *In Enron’s Wake*, *supra* note 99, at 404 tbl.3 (of thirty defendants, thirteen pled guilty, seven received guilty verdicts after trial, three received not guilty verdicts, and seven cases resulted in mistrials).

106. *Id.* at 407.

appeal.¹⁰⁷ Both Professor Brickey and *The American Lawyer* nod toward the idea of poor lawyering by the DOJ as potentially contributing to the nonconvictions;¹⁰⁸ however, in evaluating the “losses,” Brickey does not dismiss the “issues of complexity, witness credibility, juror sophistication, and myriad unquantifiable factors” that play into the results.¹⁰⁹ Certainly, proving accounting fraud through numerous witnesses, financial experts, and hundreds of documents is substantially more complicated than proving the average drug deal on the street.¹¹⁰

The Corporate Fraud Task Force has been criticized as being an instrument created to calm market fears in the summer of 2002, rather than a true force of change in prosecutorial approach to corporate crime.¹¹¹ The Corporate Fraud Database identified 357 indictments in major corporate fraud cases between formation of the task force in 2002 and 2005; the number of indictments dropped substantially after that time period with only fourteen cases identified by the DOJ as significant cases in 2006, and only twelve major case indictments in the first nine months of 2007.¹¹² With the spotlight

107. See Eviatar, *supra* note 95, at 20; Barker et al., *supra* note 1, at 37 (for those cases that went to trial, 62% resulted in guilty verdicts, 21% resulted in acquittals, and 17% in mistrials; moreover, 12% of the guilty verdicts were overturned on appeal); Corporate Fraud Database, *supra* note 99.

108. See Brickey, *In Enron's Wake*, *supra* note 99, at 407 (“[A]t first blush, the government’s trial record does not reflect overwhelming success and appears to validate—or at least provide support for—the criticism that prosecutors have overreached by trying to find crimes where none really exist.”); Eviatar, *supra* note 95, at 20 (“Among the cases highlighted on the task force Web site we found several high-profile acquittals, hung juries, and appellate reversals—and some of those prosecution failures were due specifically to questionable tactics by the Justice Department.”).

109. Brickey, *In Enron's Wake*, *supra* note 99, at 410.

110. FRIEDRICHS, *supra* note 10, at 278.

Corporate and finance crime cases in particular require large expenditures of time and special investigative skills, involve greater difficulties in establishing criminal intent, and pose problems in obtaining appropriate witness or victim cooperation. These cases may require sifting through masses of dull and difficult-to-understand records, and the evidentiary issues are especially complex.

Id. (citation omitted).

111. Eviatar, *supra* note 95, at 30 (“The Corporate Fraud Task Force was just one star in a larger constellation of government efforts to calm investors in an escalating financial crisis.”). “The mandate has always been not to strangle corporate America, but to put investor confidence back into the market, which I think we have.” *Id.* (quoting Debra Wong Yang, former U.S. Attorney in Los Angeles and an original member of the Corporate Fraud Task Force).

112. *Id.* at 21; see also Corporate Fraud Database, *supra* note 99; CORPORATE FRAUD TASK FORCE 2008 REPORT, *supra* note 58, at 1.3–1.22. The Corporate Fraud Task Force reported that between July 2002 and May 2004, prosecutors had “[o]btained over 500 corporate fraud convictions or guilty pleas [and c]harged over 900 defendants and over 60 corporate CEOs and presidents with some type of corporate fraud crime in connection with over 400 filed cases.” U.S. DEP’T OF JUSTICE, CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT 2.3 (2004), http://www.justice.gov/archive/dag/cftf/2nd_yr_fraud_report.pdf.

shifted away from corporate wrongdoing, the government shifted resources aimed at corporate fraud away from investigation and enforcement.¹¹³ Most of the cases listed in the *American Lawyer* database and in the DOJ's 2008 report were brought solely by U.S. Attorneys' Offices.¹¹⁴ Indeed, a handful of local U.S. Attorneys' Offices with locations in major metropolitan areas prosecuted a majority of the cases.¹¹⁵ Contrary to DOJ claims that the decline in investigations and prosecutions marks the success of the corporate fraud initiative,¹¹⁶ continued reports of corporate fraud and wrongdoing in the news, and the meltdown in the financial markets suggests that more needs to be done.¹¹⁷

113. See Hurt, *supra* note 100, at 380 (warning that a shift away from criminal enforcement of corporate wrongdoing should not occur without strengthening private enforcement laws that were left "untouched by post-Enron reforms"); Carrie Johnson, *SEC Enforcement Cases Decline 9%*, WASH. POST, Nov. 3, 2006, at D3 (reporting on recent budget cuts and hiring freezes at the SEC); Eric Lichtblau et al., *F.B.I. Struggling to Handle Wave of Finance Cases*, N.Y. TIMES, Oct. 19, 2008, at A1 (reporting a loss of 625 agents (36% of the FBI's 2001 levels) for white-collar crime investigations as the Administration shifted its focus to antiterrorism). "[E]xecutives in the private sector say they have had difficulty attracting the bureau's attention in cases involving possible frauds of millions of dollars." Lichtblau et al., *supra*.

114. See Corporate Fraud Database, *supra* note 99. The database lists the prosecutors from each case and the location of the prosecutor at the time of prosecution. *Id.* In addition to cases brought by the Enron Task Force, some were filed by attorneys from the Criminal or Tax Divisions of the DOJ, either alone or in conjunction with the local U.S. Attorney's Office. See *id.* The 2008 Corporate Fraud Task Force Report to the President identified six major cases brought by the Criminal Division (which includes the Enron Task Force), four major cases brought by the Tax Division, and fifty-one major cases brought by U.S. Attorneys' Offices, and one joint Criminal Division/U.S. Attorney's Office prosecution. See CORPORATE FRAUD TASK FORCE 2008 REPORT, *supra* note 58, at 1.3–1.19.

115. Although the bulk of the cases were brought by the U.S. Attorneys' Offices in New York (Southern District of New York), Chicago (Northern District of Illinois), and San Francisco (Northern District of California), cases were filed in another twenty-five districts, including the Southern District of Texas (in which the Enron cases were filed—although many of these cases were brought by the Enron Task Force due to conflicts of interest within the U.S. Attorney's Office in Houston). Barker et al., *supra* note 1, at 38.

116. *Id.* at 39.

117. See Evan Perez & Kara Scannell, *FBI Launches Subprime Probe*, WALL ST. J., Jan. 30, 2008, at A3 (reporting that the FBI "is working with the SEC, which has opened more than three dozen investigations in the subprime-mortgage business, including the role of mortgage brokers, investment banks and due-diligence companies involved in the underwriting and securitization of loans"); M.P. Narayanan et al., *The Economic Impact of Backdating of Executive Stock Options*, 105 MICH. L. REV. 1597, 1601 (2007) (noting that backdating options cost shareholders an average of \$389 million in market capitalization, compared to an average gain of about \$500,000 in additional executive compensation); see also Barker et al., *supra* note 1, at 39 (plotting on multiple graphs the decline in investigations and indictments (peaked in 2003), guilty pleas (peaked in 2003), and trial outcomes (peaked in 2004) since the Corporate Fraud Task Force became operational). Notably, the number of investigations, indictments, and guilty pleas for the years 1994 through 1999 were negligible. *Id.* The fallout from the subprime mortgage crisis goes beyond the criminal investigations, and has worldwide effects, including the U.S. government bailout of banks and insurance companies, tightening of credit, record job losses, and spiraling national debt. See Steven A. Ramirez, *Lessons from the Subprime Debacle: Stress Testing CEO Autonomy*, 54

Criminal prosecutions occur after a crime has already been committed. Thus, while some would argue prosecutions can deter future crimes by assuring punishment, it is generally performed after the fact. Yet, with corporate crime, the criminal acts are often ongoing and persistent so that early discovery and prosecution can prevent greater losses.¹¹⁸ In 2006, Professor Erik Lie conducted a study of options and discovered that backdating of options awarded to corporate executives as incentives was rampant.¹¹⁹ After *The Wall Street Journal* persisted in investigating the backdating scandal, the DOJ and FBI formed a task force to investigate and prosecute the crimes.¹²⁰ Thus, the DOJ did finally step in to prosecute, but not in advance of an investigation spurred by the private sector. Likewise, as early as 2004, the FBI suspected fraud in the mortgage and subprime mortgage market, but did not pursue the investigation due to a lack of funding and staffing, after overall FBI staffing decreased between 2001 and 2007 and

ST. LOUIS U. L.J. 1, 5–7 (2009) (describing the economic effects and implications from the mortgage crisis). The staggering losses from the mortgage crisis have spurred state attorneys general to action, indicting loan processors, mortgage brokers, and bank officers. See David Segal, *Financial Fraud Rises as Target for Prosecutors*, N.Y. TIMES, Mar. 12, 2009, at A1 (reporting that the Obama Administration's budget proposal "includ[ed] money for more F.B.I. agents to investigate mortgage fraud and white-collar crime, and a 13 percent raise for the Securities and Exchange Commission").

118. In cases where the defendants are convicted, large restitution orders offer little chance that victims will be compensated since the offenders have usually spent the money (first on luxuries, then on defense lawyers), lost their jobs, or hidden the assets prior to the judgment, and thus, have no real prospects of paying the money back. Ross Todd, *Three Cents on the Dollar*, AM. LAW. & CORP. COUNS. (LITIGATION 2007: CORPORATE FRAUD), Fall 2007, at 68–69, 72.

119. See Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?*, 83 J. FIN. ECON. 271, 294 (2007) (estimating that between 1996 and 2005, 29.2% of firms engaged in manipulation of stock option grants to top executives). Backdating options raises critical accounting, disclosure, and tax issues. After the waves of scandals from Tyco to Enron, the SEC began a probe over the pricing and timing of stock option grants in over 100 companies. See Perfect Payday: Options Scorecard, Wall St. J. Online (Sept. 4, 2007), <http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html> (listing companies that, as of September 2007, had come under scrutiny for stock options practices). The SEC requires specific disclosures involving executive compensation and stock option grants. SEC Reg. S-K, 17 C.F.R. § 229.402 (2010) (disclosure of the stock option expiration date is required by the SEC). The Sarbanes–Oxley Act of 2002 now requires companies to report the granting of stock options within two business days of their issue, whereas previously the SEC allowed companies to report options within two months, which would allow executives to backdate (when stock prices were lower) the grant to inflate option pay. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); Adam Lashinsky, *Why Options Backdating Is a Big Deal*, CNNMoney.com (July 26, 2006), <http://money.cnn.com/2006/07/26/magazines/fortune/lashinsky.fortune/index.htm>. Stock options backdating can be legal, but proper disclosure is necessary. *Id.*

120. Corporate Fraud: Options Cases, *supra* note 76 (reporting sixty-one pending options backdating cases); Charles Forelle & James Bandler, *Matter of Timing: Five More Companies Show Questionable Options Pattern*, WALL ST. J., May 22, 2006, at A1; Stephanie Saul, *Study Finds Backdating of Options Widespread*, N.Y. TIMES, July 17, 2006, at C1 (reporting that backdating stock options scandal includes encompasses more than 2,000 companies); Eviatar, *supra* note 95, at 21.

resources were shifted to post-September 11, 2001, national security priorities.¹²¹ Even though the number of agents devoted to mortgage fraud has increased from 15 to 177 agents since 2004, the overall staffing level remains “hundreds of agents below the levels seen in the 1980s during the savings and loan crisis.”¹²² More recently, the securities fraud Ponzi scheme advanced by Bernie Madoff came to light in December 2008 only after Mr. Madoff told his sons of the crime.¹²³ The U.S. House of Representatives Financial Services Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises examined the Madoff scheme as a case study to assess whether the SEC requires reorganization.¹²⁴ Given the failure of the SEC to exercise its civil enforcement authority, having a second avenue available in the criminal investigative and prosecutorial authority of a Corporate Crimes Division would have offered whistleblower Harry Markopolos two avenues of contact, and there would have been less likelihood that his complaints would be ignored.¹²⁵ Early intervention would have stemmed years of Madoff-created losses.¹²⁶

By 1903, “the growth of the [U.S.] economy and of corporate enterprise” made it “evident” that the DOJ needed to “have its own corps of specialists in antitrust law to cope with an increasingly complex enforcement situation.”¹²⁷

121. See Lichtblau et al., *supra* note 113 (reporting that nearly one-third of agents were shifted to national security priorities after the September 11, 2001 attacks, while overall staffing at the FBI decreased by 132 agents between 2001 and 2007).

122. *Id.*

123. See Amir Efrati, *Top Broker Accused of \$50 Billion Fraud*, WALL ST. J., Dec. 12, 2008, at A1; *Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 10 (2009) [hereinafter *Hearing on Regulatory Failures*] (statement of Harry Markopolos, Chartered Financial Analyst and Certified Fraud Examiner) (questioning by Rep. Scott Garrett, who asked, “but for the statement by Mr. Madoff to his sons about what he had done, we may very well not be having this hearing today, that it would not have been uncovered officially at least. Do you concur with that assessment?”, to which Markopolos responded, “Yes”).

124. See *Hearing on Regulatory Failures*, *supra* note 123, at 1 (statement of Rep. Paul E. Kanjorski, Chairman, Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters.).

125. See *id.* at 5 (statement of Markopolos, a citizen whistleblower, that the case against Madoff was “repeatedly ignored over an 8 1/2-year period between May 2000 and December 2008”). Markopolos acknowledged in his testimony that he could have gone to the FBI, but believed his concerns would have been discounted by investigators once he informed them that he had already contacted the SEC on numerous occasions. *Id.* at 25.

126. See *id.* at 5 (statement of Markopolos, testifying that when he first approached the SEC with “repeated and credible warnings” about the Madoff Ponzi scheme, the losses were likely between \$3 billion and \$7 billion, and yet the scheme was not stopped until losses had reach an estimated \$50 billion); see also Efrati, *supra* note 123 (reporting that “Madoff told his sons he believed losses from his fraud exceeded \$50 billion”).

127. U.S. DEP'T OF JUSTICE, ORGANIZATION, MISSION AND FUNCTIONS MANUAL: ANTITRUST DIVISION (2010), <http://www.justice.gov/jmd/mps/manual/atr.htm> [hereinafter ANTITRUST DIVISION FUNCTIONS MANUAL]. At the turn of the twentieth century, President Theodore Roosevelt was

Indeed, “[c]orporate antitrust cases tend to be large and complicated, stretching across various jurisdictions and lasting an extended period of time.”¹²⁸ This Article posits that the growth of the world economy and the increasing complexity of corporate enterprise present the ripe opportunity to create a new DOJ division to address the persistent corporate criminality pervasive in our society.

IV. SUPERIOR INSTITUTIONAL DESIGN: CORPORATE CRIMES DIVISION PROPOSAL

A. *Defining Corporate Crime*

Edwin Sutherland, credited with coining the phrase “white collar crime,”¹²⁹ defined it as a “crime committed by a person of respectability and high social status in the course of his occupation.”¹³⁰ Sutherland studied the crimes of the seventy largest industrial and commercial corporations in the United States during the early twentieth century, and his research included both criminal convictions and civil judgments admitting or finding violations of the law.¹³¹ Sutherland’s definition is but one of many meanings assigned to the phrase.¹³²

“Corporate crime” is a type of white-collar crime, and, as such, its definition can encompass a good deal of activity.¹³³ Some noted categories of corporate crime include fraud, tax evasion, economic exploitation, antitrust activity, false advertising, theft, unfair labor practices, hazardous working conditions, violent torts, unsafe consumer products, and environmental offenses.¹³⁴ John Braithwaite defines corporate crime as the “conduct of a corporation, or of employees acting on behalf of a corporation, which is proscribed and punishable by law.”¹³⁵ Marshall Clinard has observed that

locked in a battle to wrest control of the U.S. economy from the monopolistic practices of corporate trusts. See FRIEDRICHS, *supra* note 10, at 56. In 1903, the President appointed an Assistant to the Attorney General to pursue antitrust crimes. ANTITRUST DIVISION FUNCTIONS MANUAL, *supra*. This was the seed for the Antitrust Division, which was formally established in 1933. *Id.*

128. FRIEDRICHS, *supra* note 10, at 282.

129. See Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1, 1 (1940).

130. EDWIN H. SUTHERLAND, *WHITE-COLLAR CRIME: THE UNCUT VERSION* 7 (1983).

131. See HARTLEY, *supra* note 19, at 2–3 (recounting Sutherland’s study).

132. See Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 372 n.72 (2003) (reviewing the various definitions given to “white-collar crime”).

133. Corporate fraud is a subset of white-collar crime. As an example, in February 2007, the FBI had over 18,000 pending white-collar crime cases, as compared to its 492 pending corporate fraud cases. Corporate Fraud: Options Cases, *supra* note 76.

134. See HARTLEY, *supra* note 19, at 21–31; CLINARD, *supra* note 20, at 14.

135. JOHN BRAITHWAITE, *CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY* 6 (1984); see also SALLY S. SIMPSON, *CORPORATE CRIME, LAW, AND SOCIAL CONTROL* 6–9 (2002) (assessing Braithwaite’s definition of corporate crime).

corporations have been shielded from the stigma of the “criminal” label by ensuring that a range of non-criminal punishments are available to address corporate wrongdoing, including “administrative and civil penalties [such as] warnings, injunctions, consent orders, and non-criminal monetary payments.”¹³⁶ In fact, that list has grown in recent years to include non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs).¹³⁷ Consequently, Clinard asserts that administrative, civil, and criminal sanctions all should be considered in any definition of corporate crime.¹³⁸ Recent malfeasance by corporate executives that appears to have benefitted them at the expense of corporate shareholders, but occurred subject to board or executive affirmation, suggests that a more refined definition as to what is included and what is not included may be in order.¹³⁹ Thus, a

136. See CLINARD, *supra* note 20, at 15.

137. See U.S. ATTORNEYS’ MANUAL, *supra* note 46, at §§ 9-22.010 to 9-22.200 (describing pretrial diversion program); Finder & McConnell, *supra* note 48, at 1–3, 17–20; Ramirez, *supra* note 47, at 951–53.

138. CLINARD, *supra* note 20, at 15.

139. The Model Penal Code (MPC) defines corporate crime in section 2.07(1), but the definition is limited in scope:

- (1) A corporation may be convicted of the commission of an offense if:
 - (a) The offense is a violation or the offense as defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or
 - (b) The offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
 - (c) The commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

MODEL PENAL CODE § 2.07(1). The MPC includes the following definitions within § 2.07:

- (4) As used in this Section:
 - (a) “corporation” does not include an entity organized as or by a governmental agency for the execution of a governmental program;
 - (b) “agent” means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;
 - (c) “high managerial agent” means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

Id. § 2.07(4); see also Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 629–31 (1988) (reporting that many states that have

corporate official or employee commits a corporate crime if the official or employee violates the law in acting on behalf of the corporation, but if he or she gains personal benefit in the commission of a crime against the corporation without its knowledge or consent, as in the case of embezzlement of corporate funds, it is occupational crime and not corporate crime.

In creating a Corporate Crimes Division, the scope of the division would be more narrowly defined, and would limit the types of corporate crime it pursues. The DOJ already has divisions dedicated to addressing violations of antitrust, environmental, and tax laws.¹⁴⁰ The unique feature of this division would be that unlike those divisions, which are defined by a narrow set of laws they are charged to enforce, this new division would combine purposes by looking to enforce certain groups of laws, but more significantly, focusing on the type of perpetrator. The Criminal and Civil Divisions have broad legal responsibility for enforcing the laws of the United States. The Corporate Crimes Division would focus on cases of fraud, especially financial crimes and fraud against the government, which would otherwise fall within the scope of these two divisions or the U.S. Attorneys' Offices across the United States. The division would also consider the alleged perpetrator, and pursue activities by major corporate actors where the potential for harm is significant. In this format, the division might be better compared to the recently created National Security Division, which pursues violations concerning national security laws, but more significantly, pursues perpetrators who threaten national security.¹⁴¹

Segregating corporate crime from other types of economic crimes is appropriate for many reasons. The continued growth of corporate conglomerates that operate nationwide, or even multinationally, means that the effect of criminality is often multidistrict, at least.¹⁴² Pursuing such corporations through the Corporate Crimes Division would eliminate the territorial issues that arise when more than one federal district, and, therefore, more than one U.S. Attorney's Office, is involved.¹⁴³ Additionally, the

legislatively articulated corporate criminal liability appear to have patterned statutory language in some degree after the MPC, but most have not resorted to the limited version of corporate criminal liability articulated in MPC § 2.07).

140. See U.S. ATTORNEYS' MANUAL, *supra* note 46.

141. See Mission and Functions, *supra* note 61.

142. See, e.g., U.S. ATTORNEYS' MANUAL, *supra* note 46, at § 9-27.641 (Multi-District (Global) Agreement Requests) (click on "Title 9," then "9-27.000," followed by "9-27.641").

143. See, e.g., *id.* at § 9-44.160 (Health Care Fraud Investigations in Multiple Districts). Section 9-44.160(III) provides guidance on multidistrict litigation:

When a federal or state investigative agency, a United States Attorney's Office or the Department of Justice ascertains that a subject is under investigation in multiple jurisdictions (whether by one or multiple agencies), they should convey that information to the relevant investigative agencies and the Criminal

complexity of multidistrict corporate structures requires greater expertise to investigate and analyze.¹⁴⁴ Consequently, a Corporate Crimes Division that includes a variety of professionals would have at its disposal the expertise to sort through the organizational relationships of the megacorporation. Moreover, the complexity of the laws that govern corporate conduct, such as securities and banking laws, require legal and financial expertise that is often not available in the typical U.S. Attorney's Office.¹⁴⁵ To the degree that a particular office does encounter a fair share of such litigation,¹⁴⁶ those offices would still be encouraged to pursue such cases, but they would have the added benefit of the Corporate Crimes Division's experts to aid in investigating and preparing the case for trial.¹⁴⁷

and/or Civil Divisions of the Department of Justice and the appropriate United States Attorneys' Offices so that, where appropriate, they can develop together a nationwide strategy to most effectively coordinate the multiple efforts and efficiently use resources. Where the subject operates only in one state or in one metropolitan area, communication to the relevant United States Attorneys is sufficient. In other instances of multiple investigations of the same subject, the U.S. Attorney's Office must notify, as early as possible, the Criminal and/or Civil Divisions and relevant investigative agencies by letter or electronic mail of the multiple investigations and the following information:

- A. The identity of the subjects of the investigation;
- B. A summary of the factual allegations to be investigated; and
- C. A preliminary assessment of the statutes which may have been violated.

Id.

144. See CORPORATE FRAUD TASK FORCE 2008 REPORT, *supra* note 58, at 1.5–1.14; HARTLEY, *supra* note 19, at 67.

145. Joan Neff Gurney, *Factors Influencing the Decision to Prosecute Economic Crime*, 23 CRIMINOLOGY 609, 620 (1985).

Organizations generate large volumes of paper and their financial records can be difficult to understand for those without adequate training in the fundamentals of accounting. The [prosecutors] lack[] such training, and they also lack[] the resources to be able to afford the luxury of allowing a staff member to spend a large amount of time on any one case.

Id.

146. See CORPORATE FRAUD TASK FORCE 2008 REPORT, *supra* note 58, at 1.5–1.14.

147. See James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 238–39 (2008).

[T]he prosecution of criminal enterprises stretching across many states necessitated the formation of multidistrict prosecution teams. The DOJ began to call conferences of First Assistant U.S. Attorneys and other supervisors in specialized areas (for example, terrorism and white-collar fraud). . . . Some AUSAs acquire national reputations for expertise in their area, a development recognized by the DOJ when it draws upon experienced career assistants to make training videos and to teach seminars at the National Advocacy Institute. Assistants participating in training seminars at the National Advocacy Center inevitably become acquainted with those leading the seminars as well as with their fellow participants from other districts, and can seek advice and

The cost of corporate crime outweighs that of conventional crime many times over.¹⁴⁸ The restriction on civil remedies in securities cases and other corporate fraud cases has created a void in oversight that is currently filled by resort to criminal prosecution.¹⁴⁹ These restrictions limiting civil recourse and remedies have led directly to higher regulatory burdens for all businesses.¹⁵⁰ Alan Greenspan acknowledged that the flaw in the deregulatory actions of the last decade was the failure to account for the corporate agent's willingness to place short-term gain over the long-run self-interest of the corporation.¹⁵¹ With corporate managers unable or unwilling to protect the long-range interest of the corporate entity,¹⁵² shareholders unable to hold corporate managers to their obligation to protect that interest,¹⁵³ and professional gatekeepers such as accountants, analysts, and lawyers willing to sacrifice

information from them

Id. Although Eisenstein argues that training at the National Advocacy Institute for Assistant U.S. Attorneys (AUSAs) has lessened the need for centralized authority through Main Justice, his observations about the value of training supports this proposal for a Corporate Crimes Division in that expertise in fighting corporate crime will be furthered with a division devoted to its cause, and those experts can aid in the training of AUSAs who work in districts across the United States.

148. See Fletcher, *supra* note 4 (discussing the costs of corporate crime).

149. See Hurt, *supra* note 100, at 389 (noting that empirical studies of post-Private Securities Litigation Reform Act of 1995 (PSLRA) effects indicate that dismissal rates are much higher now (66.7% compared to 28.7% before the PSLRA), and that fewer meritorious cases are brought because of lower expected damages); Ramirez, *supra* note 47, at 969–70 (asserting that stiffer criminal penalties are necessary to compensate for lower rates of civil enforcement due to changes in law that lessen the likelihood of successful civil lawsuits against corporations to address corporate wrongdoing); Vikramaditya S. Khanna, *Politics and Corporate Crime Legislation*, REGULATION, Spring 2004, at 30, 32 (observing that corporations would prefer criminal legislation, which imposes a higher burden of proof on the prosecution, over civil legislation, which entails greater private enforcement); Ramirez, *supra* note 15, at 1089–91 (arguing against relaxing private civil remedies for securities fraud in light of the rampant financial market fraud of the 1980s and 1990s).

150. See Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 20, and 29 U.S.C.).

151. See *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 33 (2008) (preliminary transcript) (statement of Alan Greenspan, Former Chairman, Federal Reserve Board), available at <http://oversight.house.gov/images/stories/documents/20081024163819.pdf> (“I made a mistake in presuming that the self-interest of organizations, specifically banks and others, were such . . . that they were best capable of protecting their own shareholders and their equity in the firms.”).

152. See Ramirez, *supra* note 117, at 6 & nn.39–41 (“America’s flawed system of corporate governance operated to allow CEOs to harvest huge compensation payments while offloading staggering risks upon their companies and the global economy generally.”).

153. See Hurt, *supra* note 100, at 380–89 (discussing the limits of private litigation avenues available to curb corporate misconduct); see also *supra* text accompanying note 149. Professor Hurt observed that while “corporate crimes may be harder to detect initially than some street crimes, which are more self-revealing, prosecutors have some effective investigatory and charging tools at their disposal to identify and confront individuals suspected of corporate crimes [that can] greatly increase the likelihood of a guilty plea or conviction.” Hurt, *supra* note 100, at 403.

reputational capital for generous consulting fees,¹⁵⁴ affirmative measures to detect, investigate, and prosecute the criminal actions of corporations through their agents can be best accomplished by creating a division committed to that course.

B. The Proposal

The Corporate Crimes Division would combine the resources and personnel from the Criminal Division Fraud Section that address, as part of that section's responsibilities, "[i]nvestigating and prosecuting sophisticated and multidistrict white-collar crimes including corporate, securities, and investment fraud, government program and procurement fraud, and international criminal violations including the bribery of foreign government officials in violation of the Foreign Corrupt Practices Act,"¹⁵⁵ with the expertise of various professionals and the investigative strengths of federal agencies responsible for regulating and overseeing corporations. In addition to its focus on corporate crime litigation, the Corporate Crimes Division would also advise the Attorney General, Congress, and the White House on matters of corporate crime, develop legislative and policy proposals to enhance corporate crime fighting and to deter corporate criminality, coordinate corporate crime investigations and prosecutions across the DOJ, and develop and promote training and expertise in detecting, investigating, and prosecuting corporate crime.

Each of the DOJ litigating divisions is divided into sections based, in part, upon expertise. The Corporate Crimes Division would be constructed to limit its mission to corporate fraud in its many variations, but it might also be divided into litigating sections, such as the following: (1) a financial fraud section, including securities fraud, banking fraud, investment fraud, and accounting fraud;¹⁵⁶ (2) a government procurement fraud section;¹⁵⁷ (3) a

154. See John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1405–08 (2002).

155. See U.S. DEP'T OF JUSTICE, ORGANIZATION, MISSION AND FUNCTIONS MANUAL: CRIMINAL DIVISION (2010), <http://www.usdoj.gov/jmd/mps/manual/crm.htm>.

156. See, e.g., Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78mm (2006)); Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 4, 102 Stat. 4677, 4680; 18 U.S.C. § 1344 (2006) (bank fraud); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12, 15, and 18 U.S.C.).

157. See, e.g., 18 U.S.C. § 1031 (2006) (major fraud); Howard Cox, *FASA and False Certifications: Procurement Fraud on the Information Superhighway*, 25 PUB. CONT. L.J. 1, 13–15 (1995) (discussing the broad variety of federal laws used to criminally prosecute government procurement fraud).

health care fraud section,¹⁵⁸ and (4) a foreign commerce section, addressing cases falling under the Foreign Corrupt Practices Act.¹⁵⁹ In addition to government enforcement through trial litigation, the Corporate Crimes Division would incorporate an appellate section that would draw cases from all the litigating sections, much like those sections in the Antitrust Division¹⁶⁰ or the Criminal Division.¹⁶¹ The division would also benefit from an economic and financial analysis section that would consolidate the expertise of financial experts, including forensic accountants, financial analysts, and economists.¹⁶²

Finally, the division would include a legislative policy and regulation section to advance the nonlitigating elements of its mission.¹⁶³ This section would be responsible for developing division policy and advocating for regulatory policy consistent with law enforcement goals toward the corporate sector. One benefit from this approach would be providing consistency in criminal prosecutions and in prosecution deferrals. Critics have attacked the uneven application of the DOJ's corporate charging policies among the ninety-three U.S. Attorneys' Offices, including the use of DPAs and NPAs, and related issues such as appointment of monitors and waiver of attorney and work product privileges, even when such agreements are to be made available to prospective criminal defendants.¹⁶⁴ Although relatively rare a mere decade

158. See, e.g., 18 U.S.C. § 371 (2006) (conspiracy to defraud the government); 18 U.S.C. § 1341 (2006 & Supp. 2008) (fraud); 18 U.S.C. § 1343 (2006 & Supp. 2008) (mail fraud); 18 U.S.C. §§ 1961–1968 (2006) (Racketeer Influenced and Corrupt Organizations (RICO) statute); Stephen M. Blank et al., *Health Care Fraud*, 46 AM. CRIM. L. REV. 701 (2009); James G. Sheehan & Jesse A. Goldner, *Beyond the Anti-Kickback Statute: New Entities, New Theories in Healthcare Fraud Prosecutions*, 40 J. HEALTH L. 167, 171–72, 179–80 (2007) (discussing applicable laws in prosecuting corporations for health care fraud).

159. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd(1)(3), 78ff (2006); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd(1)(3), 78ff (2006)).

160. See United States Department of Justice, Antitrust Division Organization Chart, <http://www.justice.gov/atr/org.htm> (last visited July 16, 2010) [hereinafter Antitrust Division Organization Chart].

161. See Criminal Division Organization Chart, *supra* note 66.

162. The DOJ Antitrust Division's Competition Policy, Economic Regulatory, and Economic Litigation Sections, for example, have on staff economists who work with litigators and form economic policy. See United States Department of Justice, Antitrust Division: Sections and Offices, <http://www.justice.gov/atr/sections.htm#ers> (last visited July 16, 2010).

163. See, e.g., United States Department of Justice, National Security Division, Law and Policy Office, <http://www.usdoj.gov/nsd/law.htm> (last visited July 16, 2010); United States Department of Justice, Tax Division, About Us, http://www.justice.gov/tax/about_us.htm [hereinafter Tax Division, About Us] (last visited July 16, 2010); United States Department of Justice, Criminal Division, Office of Policy and Legislation, <http://www.justice.gov/criminal/about/opl.html> (last visited July 16, 2010).

164. See, e.g., Finder & McConnell, *supra* note 48, at 1.

ago, these alternatives to full-scale criminal prosecution have mushroomed since Arthur Andersen's indictment,¹⁶⁵ conviction,¹⁶⁶ demise,¹⁶⁷ and success on appeal.¹⁶⁸ Because the DPA and NPA approaches benefit both the defendant and the government by lowering the risk to success posed by trial and appeal, decreasing litigation costs, and offering some control over the outcome, there is incentive to negotiate against criminal prosecution.¹⁶⁹ Furthermore, the government avoids the high burden of proof (beyond a reasonable doubt), and the corporation avoids the risk of collateral damage if convicted, such as debarment,¹⁷⁰ or exposure to civil lawsuits riding the coattails of the criminal litigation.¹⁷¹

Presently, corporate criminal fraud is one of many areas of concern in the Criminal Division of the DOJ.¹⁷² The Assistant Attorney General for the Criminal Division also has responsibility over diverse criminal sections, such as the gang unit, the capital case unit, the child exploitation and obscenity

165. Arthur Andersen, formerly one of the major auditing firms, was criminally investigated for destroying Enron-related documents. See generally Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107 (2006). Arthur Andersen was charged with a single-count indictment for obstruction of justice, and was convicted by a federal jury in Houston, Texas. *Id.* Although the firm's conviction was affirmed by the Fifth Circuit, it was reversed and remanded by a unanimous Supreme Court. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005) (holding that the jury instructions failed to properly convey the elements of "corrupt persuasion" for a conviction under 18 U.S.C. § 1512(b)).

166. *Arthur Andersen LLP*, 544 U.S. at 698.

167. It was the criminal indictment and not the conviction that sealed Arthur Andersen's fate. See Finder & McConnell, *supra* note 48, at 3.

168. *Arthur Andersen LLP*, 544 U.S. at 697 (unanimous decision); HARTLEY, *supra* note 19, at 60–62; Ainslie, *supra* note 165, at 123.

169. See Finder & McConnell, *supra* note 48, at 3; Ramirez, *supra* note 47, at 951–53 (discussing the use and benefits of DPAs).

170. See Ramirez, *supra* note 47, at 944 (identifying collateral consequences of corporate convictions, which may include "debarment from government contracting, treble civil damages, shareholder derivative actions, [and] regulatory fines"); *id.* at 949–51 (further describing the impact of debarment on a corporation, especially exclusion provisions known as the "death penalty" in health care fraud cases); Kurt Eichenwald, *HCA to Pay \$95 Million in Fraud Case*, N.Y. TIMES, Dec. 15, 2000, at C1 (reporting that "[a]lthough the practices involve widespread criminal actions in HCA's hospital system, the guilty pleas will be formally entered by two inactive subsidiaries").

171. See Ramirez, *supra* note 47, at 946 ("[C]ivil lawsuits based upon the underlying proven criminal conduct can be even more injurious because the standard of proof for establishing civil liability is lower than the 'beyond a reasonable doubt' standard mandated in criminal prosecutions.") (citations omitted); Khanna, *supra* note 149, at 32 (observing that corporations would prefer criminal legislation to civil suits because there is greater private civil enforcement and higher criminal procedural standards).

172. Carrie Johnson, *Justice Department Putting New Focus on Combating Corporate Fraud*, WASH. POST, Feb. 12, 2009, at A6 (noting that "Justice Department and FBI officials [told] lawmakers that they are looking into more than 530 cases of alleged corporate malfeasance" and that FBI Deputy Director Pistole said the Bureau "is 'doing a complete scrub of all resources' to ensure that enough agents are assigned to corporate investigations").

section, the organized crime and racketeering section, and the narcotic and dangerous drug section, just to name a few.¹⁷³ Given such broad authority and responsibility, it is not surprising that corporate crime is not given full attention until a pattern of criminality erupts into a crisis, such as the savings and loan crisis, the corporate accounting fraud crisis, or the more recent subprime mortgage crisis.¹⁷⁴ Just as the Antitrust Division has had success in addressing anticompetitive practices among corporations, and the Environment and Natural Resources Division has pursued environmental crimes,¹⁷⁵ the Corporate Crimes Division would likely enjoy similar success. Led by the policy and regulation section, the Corporate Crimes Division could anticipate risks of corporate criminality and promote legislative stopgaps, or at the very least, could recognize patterns of corporate criminality at an early stage and prosecute the criminal trailblazers. Through earlier prosecution, the division could deliver a message of deterrence to those who might follow, rather than wait until wrongdoing reached a crisis stage and then lobby Congress and the White House for additional resources.¹⁷⁶ Early intervention and pursuit of criminal conduct would reduce the social harm by protecting the American business sector's reputation¹⁷⁷ and avoid risking vast sums of American taxpayer dollars in another bailout.¹⁷⁸

173. See Criminal Division Organization Chart, *supra* note 66.

174. See Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, FDIC BANKING REV., Dec. 2000, at 26, 33, available at http://www.fdic.gov/bank/analytical/banking/2000dec/brv13n2_2.pdf (describing the Savings and Loans Crisis of the 1980s and 1990s, which resulted at that time in the greatest collapse of financial institutions to occur since the Great Depression and cost taxpayers an estimated \$124 billion to resolve); *supra* text accompanying notes 100 (Enron) and 117 (subprime mortgage crisis).

175. See Russell Mokhiber, Top 100 Corporate Criminals of the Decade, Corporate Crime Reporter (n.d.), <http://www.corporatecrimereporter.com/top100.html> (listing the top 100 companies by size of criminal fine imposed during the 1990s). Six out of the top ten fines were for antitrust crimes, as were twenty of the top one hundred. *Id.* Thirty-eight of the top one hundred fines were for environmental crimes. *Id.* Thus, pursuit of antitrust and environmental crimes together accounted for nearly three-fifths of the top one hundred criminal fines levied against corporations. See *id.*

176. See, e.g., Lichtblau et al., *supra* note 113 (describing how the FBI's warnings of the mortgage fraud crisis as early as 2004 went unheeded and how its requests for additional resources were ignored).

177. See Ramirez, *supra* note 47, at 994–95. “Foreign investor confidence in U.S. businesses is influenced by the perception of the integrity of U.S. financial markets. Thus, confidence in U.S. businesses can lower the cost of capital by reducing interest rates, which is beneficial to all U.S. investors.” *Id.* at 1000.

178. See, e.g., Mark Pittman & Bob Ivry, Financial Rescue Nears GDP as Pledges Top \$12.8 Trillion, Bloomberg.com (Mar. 31, 2009), <http://www.bloomberg.com/apps/news?pid=20601087&sid=armOzfkwtCA4> (“The U.S. government and the Federal Reserve have spent, lent or committed \$12.8 trillion, an amount that approaches the value of everything produced in the country last year, to stem the longest recession since the 1930s.”).

Given the complexity of corporate crime, the need to continue to coordinate interagency efforts with investigating agencies is critical to successful investigations and prosecutions.¹⁷⁹ The Corporate Crimes Division would retain the task forces described above, and replace the current chairpersons with the Assistant Attorney General of the Corporate Crimes Division, or the appropriate Assistant or Deputy Attorney General of the particular related litigating section. Presently, members of the Financial Fraud Enforcement Task Force include senior officials of the Department of the Treasury, the Department of Commerce, the Department of Labor, the Department of Housing and Urban Development, the Department of Education, the Department of Homeland Security, the SEC, the Commodity Futures Trading Commission, the Federal Trade Commission, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Federal Housing Finance Agency, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Small Business Administration, the FBI, the Social Security Administration, the Internal Revenue Service (Criminal Investigations), the Financial Crimes Enforcement Network, the U.S. Postal Inspection Service, the U.S. Secret Service, and the U.S. Immigration and Customs Enforcement, among others.¹⁸⁰ This task force represents “the talents and experience of thousands of investigators, attorneys, accountants, and regulatory experts.”¹⁸¹ With a Corporate Crimes Division in place, the goal would be to further develop the relationships among these agencies, not just at the managerial level, but more deeply within the organizations, and potentially even drawing some experts from the agencies into the Corporate Crimes Division litigating sections as

179. See Johan A. de Bruijn & Ernst F. ten Heuvelhof, *Policy Networks & Governance*, in INSTITUTIONAL DESIGN 161, 162, 173–75 (David L. Weimer ed., 1995) (addressing strategic concepts of network management and network restructuring). The authors observe:

Creating stability and points of reference in a network is considered . . . a[n] important aspect of network management. One approach to reducing instability and the uncertainty it produces is for organizations to develop more credible relations by sharing members. These members, as in interlocking directorates, can convey reliable information between organizations to facilitate coordination.

Id. at 174 (citations omitted). The task forces can approximate in government the interlocking network management for investigative and prosecutorial offices and divisions within and outside of the DOJ. In maximizing use of task forces, however, the participants must perceive that there is a “net benefit” in information sharing, providing a “cooperative surplus” for each agency or office, perhaps in the form of recognition for its contribution to any subsequent convictions. See *id.* at 175.

180. See Exec. Order No. 13,519, 74 Fed. Reg. 60,123 (Nov. 17, 2009).

181. See, e.g., CORPORATE FRAUD TASK FORCE 2008 REPORT, *supra* note 58, at iii.

permanent members of the Corporate Crimes Division.¹⁸² In addition to the permanent employees of the Corporate Crimes Division, agencies such as the SEC and the DOJ could implement cross-designations, so that an SEC attorney or investigator could cross into the division temporarily to aid in an ongoing case or set of cases.

Some experts would be permanently associated with a particular litigating section, as distinguished from temporarily being assigned to the economic and financial analysis section. Thus, securities investigators would be hired as part of the financial fraud section,¹⁸³ for example, which would also include financial analysts and economists, engineers or logisticians would be hired as part of the procurement fraud section,¹⁸⁴ and nurses or other medical experts would be hired as part of the health care fraud section. Dedicated professionals and investigators within the division could ease the burden on the FBI and provide institutional consistency. Some experts, such as forensic accountants, would be available on a broader scale throughout the Corporate Crimes Division, and would be assigned to the economic and financial analysis section,¹⁸⁵ where their expertise may be as useful in uncovering investment fraud as it would be in uncovering health care fraud.¹⁸⁶

One critical feature of this proposal is that U.S. Attorneys' Offices throughout the country would retain local authority to prosecute corporate crime. As was discussed above, several of the offices, especially those in major metropolitan areas with active financial centers, have seen essential corporate crime fighting success.¹⁸⁷ Those offices may already have separate

182. See de Bruijn & ten Heuvelhof, *supra* note 179, at 175 ("Network management can be viewed as the reworking of relations in such a way that the goals of individual actors and those of the governing actor are sufficiently congruent to offer mutual benefits from cooperation.").

183. See, e.g., *Hearing on Regulatory Failures*, *supra* note 123, at 33–34 (statement of Harry Markopolos) (recommending that the SEC hire a variety of financial professionals to improve its investigatory operations).

184. See NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT, *supra* note 58, at 34 (noting that the task force is creating an expert witness directory to identify "individuals with expertise in subjects relevant to procurement fraud prosecution").

185. See, e.g., *supra* text accompanying note 162.

186. See, e.g., Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 770 (2009) (describing the use of forensic accountants and Wall Street research analysts by plaintiff securities firms to review financial documents of a corporation to determine whether to file a claim and to unearth facts to support the claim).

187. See *supra* text accompanying note 115. U.S. Attorneys' Offices may continue to pursue cases, especially larger offices with sections dedicated to securities fraud or corporate crime, such as the Northern District of California (San Francisco), which has a Securities Fraud Section and a White Collar Crime Section as part of its Criminal Division, or the Eastern District of Pennsylvania (Philadelphia), which has a Financial Institution Fraud Section and a Government and Health Care Fraud Section as part of its Criminal Division. See United States Department of Justice, United

financial fraud units operating within the larger U.S. Attorneys' Offices, and, even if no separate section is devoted to corporate crime, many offices retain experienced litigators who are assets to the DOJ and have been highly successful in litigating these types of cases in the past.¹⁸⁸ If a Corporate Crimes Division were adopted, some of these litigators may wish to transfer into the division and provide foundational expertise to its operation. These lawyers could also contribute to the division's mission through their participation in training new lawyers and in updated training through the National Advocacy Institute. As described above, one responsibility of the new division would be promoting and developing training in the detection, investigation, and prosecution of corporate crime. Retaining authority within the local offices would also contribute to the improved institutional design because it would allow for both centralized direction and oversight by the division, as well as creativity and localized cultural understanding by the U.S. Attorneys' Offices.¹⁸⁹

Moreover, retention of litigating authority with local U.S. Attorneys' Offices would advance the key feature of the Corporate Crimes Division—using the division to pursue large-scale corporate criminality, either because of the size of the corporation, the scope of the fraud, or the multidistrict extent of the fraudulent activity. Corporate fraud cases are time-consuming to investigate and costly to prosecute, relative to other criminal and civil matters.¹⁹⁰ One study of local prosecutors concluded that “[t]he evidence suggests that whenever economic crime units . . . have been established as a device for more effectively prosecuting white-collar crime, the units place protecting the property interests of corporations and other organizations ahead of protecting individual citizens from corporate wrongdoing.”¹⁹¹ Because of

States Attorney's Office: Eastern District of Pennsylvania, About the Office, <http://www.justice.gov/usao/pae/about.html> (last visited July 16, 2010).

188. See, e.g., *supra* note 187.

189. See Eisenstein, *supra* note 147, at 223–26 (recounting the arguments supporting decentralized organization in the DOJ that promotes local U.S. Attorney's Office autonomy). Among arguments supporting local autonomy is the recognition that local prosecutors have a more “intimate understanding” of the local community, including its leaders, its diversity, and the impact of these factors on case selection (such as the attitudes of potential jurors to particular crimes), as well as a clearer picture on the full scope of pending litigation in the district. *Id.*

190. See MICHAEL L. BENSON & FRANCIS T. CULLEN, COMBATING CORPORATE CRIME 66 (1998) (“Because corporate crimes are committed in organizational settings, they can be troublesome to detect, investigate, and prosecute. . . . Prevailing in such complicated cases is difficult even for experienced, well-funded federal prosecutors.”) (citations omitted); Brown, *supra* note 97, at 527–28 (discussing the difficulty in detection of criminal activity, the complexity of financial records, and the comparatively overwhelming resources of corporate conglomerates as compared to government resources to fight corporate crime).

191. FRIEDRICHS, *supra* note 10, at 278; see Gurney, *supra* note 145, at 622–23; Joan Neff Gurney, *Implementing a National Crime Control Program—The Case of an Economic Crime Unit*, in IMPLEMENTING CRIMINAL JUSTICE POLICIES 33, 43–45 (Merry Morash ed., 1982).

the resource demands of corporate fraud prosecutions, U.S. Attorneys' Offices are most likely to pursue only low-hanging fruit, that is, the cases that are easier to investigate and prosecute.¹⁹² Restructuring the DOJ's approach to corporate fraud cases would not eliminate authority of the U.S. Attorneys' Offices to pursue such cases, and indeed, some offices would likely continue to vigorously pursue larger cases, especially where local corporations are involved.

On the other hand, prosecuting such cases through the Corporate Crimes Division would offer several advantages, depending upon the circumstances. First, in instances where the suspected activity is occurring in a particularly large corporation or spanning multiple judicial districts, the division could step in with the expertise and resources available to it without draining resources away from the local U.S. Attorney's Office. Second, decisions regarding the investigation and prosecution of a corporation, made by a regionally based office or the division headquarters, could minimize any political influence that might interfere when district offices pursue local businesses, and threaten local jobs or risk political careers.¹⁹³ Third, many prosecutors eventually leave government service and go into private practice, and, therefore, depend on local businesses as future clients or sources of income.¹⁹⁴ A Corporate Crimes Division would be exempt from local pressures in assessing whether to investigate and prosecute a case against an influential major corporation.

The operational headquarters for the Corporate Crimes Division would presumably be centralized in Washington, D.C., like the other DOJ divisions.¹⁹⁵ Such a centralized location would permit ease of exchange of

192. See Gurney, *supra* note 145, at 619. In her study of a local county economic crimes unit, Gurney observed that "[t]he pressure to produce convictions coupled with limited resources produced a situation conducive to selecting cases for prosecution which could be prepared for trial quickly and easily and which had a strong probability of success." *Id.* In a study of local prosecution of corporate crime, over half of the respondents indicated that "insufficient investigative or prosecutorial personnel 'definitely' or 'probably' would limit their willingness to prosecute." BENSON & CULLEN, *supra* note 190, at 79.

193. See *supra* text accompanying notes 191–92.

194. See FRIEDRICHS, *supra* note 10, at 278. To address retention issues, the DOJ Tax Division requires all new attorney hires to serve four continuous years with the division. United States Department of Justice, Tax Division, Working for Us: Attorneys, http://www.justice.gov/tax/career_atty.htm (last visited July 16, 2010). This retention policy is not part of the Corporate Crimes Division proposal.

195. See United States Department of Justice, Antitrust Division, Contact Information, <http://www.justice.gov/atr/contact.html> [hereinafter Antitrust Division, Contact Information] (last visited July 16, 2010); United States Department of Justice, Criminal Division, Contact the Criminal Division, <http://www.justice.gov/criminal/about/contact.html> (last visited July 16, 2010); United States Department of Justice, Civil Division, Civil Division FOIA, <http://www.justice.gov/civil/foia.html> (last visited July 16, 2010); United States Department of Justice, Civil Rights Division, Office of the Assistant Attorney General,

ideas and encourage cooperation with other divisions and agencies headquartered in Washington, D.C. Additionally, regional offices (also known as “field offices”) could be established, just as they are for the Antitrust Division.¹⁹⁶ Field offices are given primary responsibility for cases arising out of assigned regions. For example, the Antitrust Division’s Chicago Field Office is assigned a region that includes all or part of twelve Midwest and Plains states.¹⁹⁷ In selecting cities for regional office locations, one could choose major financial centers (recognizing that the local U.S. Attorney’s Office likely already will have expertise and that there may be overlap in coverage), or one could choose centrally located metropolitan areas with efficient transportation systems affording easy access to the entire region.

C. Corporate Fraud Division Versus Corporate Crimes Division

The proposal described above contemplates a division focused on criminal investigation and enforcement. One possible variant on this proposal, however, is to create a Corporate Fraud Division rather than a Corporate Crimes Division to incorporate the possibility of utilizing the expertise of the division to pursue corporate offenses that do not rise to the level of a criminal violation. Other DOJ litigating divisions, such as the Tax Division¹⁹⁸ and the Environment and Natural Resources Division,¹⁹⁹ include both criminal and civil litigation sections. Several issues would arise in extending the division’s reach to include civil enforcement. First, there is the potential overlap of authority with other administrative agencies on the civil cases.²⁰⁰ Second,

<http://www.justice.gov/crt/ofcaag.php> (last visited July 16, 2010); United States Department of Justice, Environment & Natural Resources Division, Contact ENRD, http://www.usdoj.gov/enrd/ENRD_Contact.html (last visited July 16, 2010); United States Department of Justice, Tax Division, Freedom of Information Act, <http://www.justice.gov/tax/readingroom/foia/foia1.htm> (last visited July 16, 2010).

196. The Antitrust Division has eight regional offices located across the United States to pursue criminal investigations and prosecutions; they are located in Atlanta, Chicago, Cleveland, Dallas, New York, Philadelphia, San Francisco, and Washington, D.C. See Antitrust Division Organization Chart, *supra* note 160.

197. The Chicago Field Office covers the following territory: Colorado, Illinois, Indiana, Iowa, Kansas, Western District of Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin. Antitrust Division, Contact Information, *supra* note 195.

198. See Tax Division, About Us, *supra* note 163.

199. See United States Department of Justice, Environment & Natural Resources Division, About ENRD, http://www.usdoj.gov/enrd/About_ENRD.html (last visited July 16, 2010).

200. This might be true especially in securities cases where the SEC is authorized to bring enforcement actions. See 5 U.S.C. § 551 (2006); 17 C.F.R. pt. 201 (2010).

When an SEC investigation uncovers potential securities violations, the violation usually is handled through administrative procedures set forth in the Administrative Procedure Act. The Commission may issue subpoenas, formal orders of investigation, or other means necessary to enforce the federal

there is the likelihood of parallel investigations since many corporations violate both civil and criminal laws.²⁰¹

Early in an investigation, the question of whether conduct violates both criminal and civil laws may not be obvious. The Corporate Crimes Division would be responsible for investigating corporations, but since a corporation can act only through its agents,²⁰² individuals would also be subject to prosecution by the division. If, instead, a Corporate Fraud Division was created to include a civil enforcement section, care would have to be taken to follow DOJ procedures regarding parallel investigations and to protect the constitutional rights afforded individuals in criminal proceedings.²⁰³ Parallel proceedings raise the specter of constitutional disputes arising out of the additional constitutional protections afforded to a criminal defendant, and

securities laws or to investigate any form of non-compliance with the securities laws.

PAMELA H. BUCY, *WHITE COLLAR PRACTICE* 331 (3d ed. 2005) (citation omitted). Most criminal cases begin with the SEC's initial investigation using its broad subpoena powers; once the SEC determines a violation was committed "willfully," it may recommend the case for prosecution to the DOJ. *Id.*

201. The SEC and DOJ rely on parallel civil and criminal proceedings (concurrent investigations) of the same conduct as an efficient means of law enforcement. JULIE R. O'SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 1008–20 (2001); Joseph F. Savage Jr. & Robert J. Durbin, *Government Use of Civil & Criminal Proceedings: Any Limits?*, *ANDREWS LITIG. REP. (WHITE-COLLAR CRIME)*, Dec. 2005, at 1, 3. The Securities Act of 1933 and the Securities Exchange Act of 1934 permit the SEC to share with the DOJ any information it obtains in an investigation through civil discovery. Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (2006) (providing that whenever it appears to the SEC that a violation of the Act has occurred, the SEC may "transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter"); Securities Exchange Act of 1934 § 21(d)(1), 15 U.S.C. § 78u(d)(1) (2006). The SEC retains authority to continue its civil investigation of securities law violations after making a recommendation of criminal prosecution to the DOJ. Mikah K. Story Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408*, 76 U. CIN. L. REV. 939, 952–53 (2008); see also Press Release, U.S. Dep't of Justice, Quest Diagnostics to Pay U.S. \$302 Million to Resolve Allegations that a Subsidiary Sold Misbranded Test Kits (Apr. 15, 2009), available at <http://www.justice.gov/opa/pr/2009/April/09-civ-350.html> (announcing global settlement of civil and criminal charges, with a subsidiary pleading guilty) [hereinafter Press Release, Quest Diagnostics].

202. 1 BRICKEY, *supra* note 36, §§ 3:01–3:11, at 89–126 (describing the theories by which corporate criminal liability may be imputed through the acts of a corporation's agents).

203. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325, 1389–92 (1991); Anthony A. Joseph & R. Marcus Givhan, *The New Litigative Environment: Defending a Client in Parallel Civil and Criminal Proceedings*, ALA. LAW., Jan. 1999, at 48 (discussing false claim lawsuits, media reports, audits, complaints obtained from governmental hotlines, congressional inquiries, tips or complaints from competitors, and interviews with a corporation's employees). If the government has not initiated a civil proceeding in "bad faith" to obtain evidence solely for the use in a criminal proceeding, parallel investigations are constitutionally permissible. *United States v. Kordel*, 397 U.S. 1, 11–12 (1970); *United States v. Tison*, 780 F.2d 1569, 1573 (11th Cir. 1986).

involve different rules of procedure.²⁰⁴ Potential issues created by parallel proceedings include protecting a defendant's Fifth Amendment right against self-incrimination, threats to a defendant's due process rights because of the more generous civil discovery provisions, and undermining a defendant's Sixth Amendment right to effective assistance of counsel through use of civil discovery that can lead to production of documents in civil litigation that would be harmful to the defendant's interests in criminal litigation.²⁰⁵ Furthermore, ethical issues and charges of prosecutorial misconduct might arise through defendant claims of unfair pressure by the prosecution to negotiate a civil settlement unfavorable to the defendant-corporation so that the defendant might avoid the significant collateral consequences that might accompany a criminal prosecution.²⁰⁶

A critical feature to put in place if the division were structured to address both criminal and civil investigations would be to have two Deputy Assistant Attorney Generals—one to head the criminal enforcement sections and the other to oversee the civil enforcement sections.²⁰⁷ The civil side could duplicate the specialty litigating sections, including a financial fraud section, government procurement fraud section, health care fraud section, and foreign commerce section. In contrast, the appellate section, the legislative policy and regulation section, and the economic and financial analysis section would serve the entire division in providing expertise, training, and consistency in policy application.

D. Challenges to Creating a Corporate Crimes Division

The National Security Division of the DOJ was established on September 28, 2006, to protect "America against international and domestic terrorism and other national security threats."²⁰⁸ This was "the first new Department of Justice division in almost 50 years."²⁰⁹ The division's

204. See generally FED. R. CRIM. P.

205. See Cheh, *supra* note 203, at 1325, 1389–92.

206. See Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 415 (2007) (arguing that settlements after Enron suggest that even a powerful corporation will "cave under pressure to settle to avoid an indictment, even an unjust one"); Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN. ST. L. REV. 625, 666 (2007) (discussing the pressure on corporations to agree to civil settlements to avoid greater criminal liability).

207. See *infra* Appendix.

208. U.S. DEP'T OF JUSTICE, NAT'L SEC. DIV., PROGRESS REPORT, at i (2008) [hereinafter NATIONAL SECURITY DIVISION PROGRESS REPORT]. See USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 506(b)(1), 120 Stat. 192, 248–49 (2006) (codified at 28 U.S.C. § 509A(b) (2006)) (authorizing creation of the National Security Division).

209. NATIONAL SECURITY DIVISION PROGRESS REPORT, *supra* note 208, at i. The DOJ Civil Rights Division was created in 1957. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; see

objectives were to centralize management, break down barriers between agencies, and coordinate efforts within the DOJ and the federal, state, and local governments to “enhance our ability to defend against terrorism.”²¹⁰ Just as the National Security Division was created to address the pressing issue of terrorism, the Civil Rights Division was established on the heels of the landmark United States Supreme Court decision, *Brown v. Board of Education*,²¹¹ which overturned the “separate but equal” doctrine, and the Antitrust Division was formed to enforce the Sherman Act and break up the monopoly power of powerful trusts during the Progressive Era.²¹² The time has come to once again call together the forces of the DOJ to face off against a powerful challenge to the security of the United States. Creating a Corporate Crimes Division has logical support in the consolidation of resources and expertise, as well as in addressing a scourge that is costing American taxpayers billions of dollars and American businesses untold value in reputation. Yet, there are some potential challenges to its creation that must be considered, including the risks inherent in consolidating governmental power, the potential backlash to the disruption of the status quo, and the probable lack of support from powerful corporate interests that may have the most to lose from a concerted effort to address corporate criminality.

Promoting a division dedicated to the pursuit of addressing corporate crime consolidates power that is presently spread among several DOJ divisions and throughout the nation’s U.S. Attorneys’ Offices. The primary risk in consolidating power is that it simplifies the opportunity to abuse power more directly.²¹³ Although the U.S. Attorney General, the top deputies, and the U.S. Attorneys in each district are political appointees, the DOJ is staffed with attorneys whose tenure spans administrations, and the DOJ has had a history of nonpartisanship in the exercise of prosecutorial decision making.²¹⁴ However, the U.S. Attorney scandal that began in December 2006 and erupted in January 2007 is evidence that abuse of discretion is possible even within

Office of the Attorney Gen., Order Establishing Civil Rights Division in DOJ, 22 Fed. Reg. 10,310 (Dec. 9, 1957); Drew S. Days, III, *Vindicating Civil Rights in Changing Times*, 93 YALE L.J. 990, 990–91 (1984).

210. NATIONAL SECURITY DIVISION PROGRESS REPORT, *supra* note 208, at 1.

211. 347 U.S. 483 (1954).

212. See 15 U.S.C. § 1 (2006); *supra* text accompanying notes 42–43.

213. See Eisenstein, *supra* note 147, at 222–23; John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265, 276–79 (2008).

214. See McKay, *supra* note 213, at 279–80; *Berger v. United States*, 295 U.S. 78, 88 (1935) (observing that the U.S. Attorney “may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one”).

the halls of Justice.²¹⁵ The restructuring proposed here would place primary authority for setting policy and seeking resources within the hands of a few, and with fewer persons making decisions regarding prosecutions, there is more opportunity for capture and the potential to thereby limit prosecutions overall.²¹⁶ Moreover, although the U.S. Attorneys' Offices would retain authority to pursue corporate crimes, one can envision an inability for such offices to garner more resources in that quest if there is a division that is primarily accountable for such prosecutions. Central authority could limit the effectiveness of the pursuit of corporate criminality in any number of ways, short of refusing cases. Some possibilities would be to create policies to almost exclusively pursue NPAs or DPAs, to narrow the scope of the cases by size of corporation or size of loss to exclude many potential defendants, to

215. See U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 356–58 (2008), available at <http://www.justice.gov/oig/special/s0809a/final.pdf>. The report concludes that questionable circumstances surrounded the removal of three U.S. Attorneys. *Id.* at 331–36. See also McKay, *supra* note 213, at 265, 274–75.

216. Capture occurs when an agency, though created for the public's interest, actually works in favor of the parties the agency was designed to regulate. See Joel A. Mintz, *Has Industry Captured the EPA?: Appraising Marver Bernstein's Captive Agency Theory After Fifty Years*, 17 FORDHAM ENVTL. L. REV. 1 (2005) (discussing how the "captive agency theory" conceptualized by Bernstein still has viability today in explaining the behavior of federal regulatory agencies in the twenty-first century); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 29 (1971); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 715, 725–26 (1986). In the face of the Bernie Madoff scandal, the SEC was accused of being a captive agency that "roar[s] like a mouse and bite[s] like a flea." See *Hearing on Regulatory Failures*, *supra* note 123, at 8.

Capture is the result of lobbying, corporate consolidation, and a revolving door in which regulators ultimately work for the businesses they regulate. See MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 3–4 (1955). A recent example would be former Treasury Secretary Henry (Hank) Paulson, who worked in the Pentagon from 1970 to 1972, joined Goldman Sachs in 1974, and rose to chairman and CEO of the company. See Landon Thomas, Jr., *Paulson Comes Full Circle: Bush Picks a Deficit Hawk with White House Experience*, N.Y. TIMES, May 31, 2006, at C1 (recounting Paulson's career both in and out of the government, his thirty-two years at Goldman (those who know him say he "bleeds Goldman blue"), and Goldman's historical commitment to public service with many partners pursuing careers in Washington); *Goldman Gives Ex-Chief \$18.7 Million Bonus*, N.Y. TIMES, July 4, 2006, at C2. While in that position, he was tapped by the George W. Bush Administration to be Treasury Secretary in 2006, and was a principal architect of the bailout programs in late 2008 and early 2009. See Jenny Anderson, *Goldman Chairman Gets a Bonus of \$53.4 Million*, N.Y. TIMES, Dec. 20, 2006, at C2 (reporting that the new Goldman Sachs bonus came as a result of record profit at Goldman Sachs six months after its former chairman and CEO, Henry Paulson, was selected as Treasury Secretary). When AIG released the list of beneficiaries from the federal bailout money it received, Goldman Sachs was at the top of the list, receiving \$12.9 billion in payments owed from AIG. Mary Williams Walsh, *A.I.G. Lists Firms to Which it Paid Taxpayer Money*, N.Y. TIMES, Mar. 16, 2009, at A1; William D. Cohan, *Big Profits, Big Questions*, N.Y. TIMES, Apr. 15, 2009, at A27. Only a year after a government bailout, Goldman Sachs continues to emerge from the financial crisis in strong shape, gaining market share from former rivals such as Bear Sterns and Lehman Brothers, taking on additional risk, and earning record second-quarter profits in 2009 that surpassed its earnings for all of 2008. Susanne Craig & Aaron Lucchetti, *Goldman Gains on Rivals' Pain*, WALL ST. J., July 15, 2009, at A1.

limit funding for the division²¹⁷ or investigators to pursue leads,²¹⁸ or to impose more administrative burdens upon the line attorneys recommending prosecution that would be encountered within the U.S. Attorneys' Offices.²¹⁹ Although the Financial Fraud Enforcement Task Force and the U.S. Attorneys' Offices can act as a check on the power of the division,²²⁰ this risk persists, more or less depending upon the Administration's support for vigorous prosecution of corporate criminality.²²¹ The power to abuse is already present in the current institutional structure, primarily through deprivation of resources,²²² however, centralizing authority within a DOJ division slightly enhances that risk.

Nevertheless, centralizing responsibility by implementing a Corporate Crimes Division would provide the benefit of enhanced transparency in assessing the level of support for corporate crime fighting. The current structure makes it impossible to assess what resources are dedicated to

217. A study of cases brought by the Antitrust Division from 1955 to 1994 determined that an increase in the DOJ's budget allocation to the division had a "strong positive impact on the number of cases initiated" by the division. See Vivek Ghosal & Joseph Gallo, *The Cyclical Behavior of the Department of Justice's Antitrust Enforcement Activity*, 19 INT'L J. OF INDUS. ORG. 27, 27-48 (2001). In reaching this conclusion, the study specifically considered and refuted the possibility that funding followed increases in case activity. *Id.* at 42, 48.

218. For example, the FBI shifted investigators from white-collar criminal investigations to address national security issues after September 11, 2001. See Lichtblau et al., *supra* note 113 (loss of 625 agents, or 36% of its 2001 levels of staffing for white-collar crime investigations). Despite pleas for more money and bodies to address rise in corporate crime, those requests were ignored by the Bush Administration. *Id.* In 2003 and 2004, the FBI began requesting more money to investigate financial fraud in housing markets, but was rebuffed by the Justice Department and the Office of Management and Budget. *Id.* Overall, the agency lost 132 agents from 2001 to 2007, despite requests for an increase of more than 1,100 agents, and had only 15 full-time agents devoted to mortgage fraud. *Id.*

219. For example, for indictments the Antitrust Division has a policy that requires staff to create case recommendation memoranda that can be lengthy, thereby causing delays for prosecution. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL: INVESTIGATION AND CASE DEVELOPMENT III-119 (4th ed. 2008), available at <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>. "The case recommendation package submitted by staff should typically consist of the case recommendation memoranda, draft pleadings, a proposed press release (where applicable), and any other documents deemed most relevant to a full consideration of the case, including its critical and contested elements, and its strengths and weaknesses." *Id.* "Staff's case recommendation memorandum should generally not exceed thirty (30) pages, except in appropriate circumstances (e.g., multi-count, multi-defendant indictments)" *Id.* at III-125. Of course, a thorough case recommendation analysis has the benefit of anticipating and critically analyzing potential pitfalls in the case and thereby may result in stronger cases. *Id.* at III-119 to III-120.

220. See Eisenstein, *supra* note 147, at 226.

221. In ignoring pleas for more resources to combat fraud, the White House and the Treasury Department indicated, ironically, to the DOJ and the FBI that the agencies were taking an "antibusiness attitude" that could chill corporate risk-taking. See Lichtblau et al., *supra* note 113.

222. See *id.*; *supra* text accompanying note 217 (discussing the impact of financial resources on the success of the Antitrust Division).

fighting corporate crime.²²³ Thus, if an administration chooses to decrease enforcement measures against corporations, it is difficult to sort through budgets of the various divisions, litigating sections, U.S. Attorneys' Offices, task forces, and investigative agencies to identify committed resources. While creating a new division would leave many of these participants in place, having a centralized body accountable to the DOJ, the White House, Congress, and the American people would incentivize the administrators of the division to demonstrate the effectiveness of its efforts.²²⁴ Thus, a full accounting still may not be available, but a critical measurement could be taken. Finally, in addition to federal resources expended to pursue corporate crime, state attorneys general also remain available to pursue such crimes and have been a force in addressing corporate fraud locally.²²⁵ Action by state attorneys general may call attention to lack of federal activity and spur federal investigations and prosecutions.²²⁶

Another challenge to implementing a Corporate Crimes Division could be internal resistance to institutional reform. The movement of certain litigating sections into the Corporate Crimes Division could meet resistance from within the Criminal Division (and the Civil Division, if a Corporate Fraud Division is pursued). Although the corporate fraud cases are only a fraction of the overall responsibilities for those divisions, and although major fraud cases often consume a disproportionate share of resources on a per case basis, successful negotiation of a plea or settlement can lead to large fines.²²⁷ These fines, when averaged with the other cases pursued by these divisions, can enhance

223. See *supra* text accompanying notes 94–95 (discussing the difficulty in counting cases).

224. See Philip Pettit, *Institutional Design and Rational Choice*, in *THE THEORY OF INSTITUTIONAL DESIGN* 54, 60–61 (Robert E. Goodin ed., 1996) (observing that “[u]nder ideal institutional design, . . . a suitable pattern of screens and sanctions” should be developed “to promote a procedurally conscientious and public-spirited performance” on the part of public agents).

225. See, e.g., Segal, *supra* note 117 (reporting on the efforts of state attorneys general to prosecute loan processors, mortgage brokers, and bank officers embroiled in the subprime mortgage crisis).

226. See *id.*

227. E.g., Press Release, U.S. Dep’t of Justice, Novo Nordisk Agrees to Pay \$9 Million Fine in Connection with Payment of \$1.4 Million in Kickbacks Through the United Nations Oil-for-Food Program (May 11, 2009), *available at* <http://www.justice.gov/opa/pr/2009/May/09-crm-461.html>; Press Release, U.S. Dep’t of Justice, Former Head Securities Trader for Lancer Group Hedge Funds Pleads Guilty to Conspiracy to Commit Mail, Wire and Securities Fraud (Apr. 29, 2009), *available at* <http://www.justice.gov/opa/pr/2009/April/09-crm-405.html> (announcing guilty plea to complex scheme to defraud involving conspiracy to manipulate securities trading through shell corporations); Press Release, Quest Diagnostics, *supra* note 201; Press Release, U.S. Dep’t of Justice, GSA Contractor NetApp Agrees to Pay U.S. \$128 Million to Resolve Contract Fraud Allegations (Apr. 15, 2009), *available at* <http://www.justice.gov/opa/pr/2009/April/09-civ-353.html>.

the statistics for the division.²²⁸ Moreover, even though the attention to corporate fraud can be easily shifted by national crisis, such as the shift of resources to fight terrorism after the September 11, 2001 attacks, netting a large fine from a major corporation, even if only occasionally, yields positive press. Consequently, one could envision internal resistance to the creation of a new division that plunders from the power structure of the well-established Criminal Division (and possibly, the Civil Division). Indeed, expanding the new division to encompass both civil and criminal enforcement through a Corporate Fraud Division would invite twice the resistance in that it would draw resources away from two divisions.²²⁹ Any resistance might be especially forthcoming in the aftermath of the creation of the National Security Division, which also pulled forces from the Criminal Division. Yet, one could argue that the need for both the National Security Division and the Corporate Crimes Division arose out of the overwhelming bundle of matters handled by the single Criminal Division and the failure of the federal government to effectively fight threatening criminality that undermines our national security. Quite likely, removing segments from the Criminal Division will enhance its functioning through better streamlining, while opening an opportunity to focus upon the detection, investigation, and prosecution of corporate wrongdoing.

A final challenge raised in the context of this Article is the likelihood of political resistance to institutional reform. An underlying factor of superior institutional design is the political support necessary to implement change. Politics is influenced by money and power.²³⁰ Those with economic means and power are often leaders in the business community who are frequently disinterested in aiding governmental oversight,²³¹ and are far more interested

228. See, e.g., FY 2008 PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 11, at II-11 to II-32; Gurney, *supra* note 145, at 619 (recognizing the “pressure to produce convictions coupled with limited resources”).

229. See, e.g., U.S. DEP’T OF JUSTICE, 2008 BUDGET & SUMMARY REPORT, *available at* http://www.justice.gov/jmd/2008summary/pdf/070_gla.pdf; U.S. DEP’T OF JUSTICE, CRIMINAL DIV., FRAUD SECTION ACTIVITIES REPORT (2008), <http://www.justice.gov/criminal/fraud/documents/reports/2008/actrpt08.pdf>.

230. See OLSON, *supra* note 216, at 141–43 (observing that the interests of American businesses are well represented in American politics, despite their comparatively small size relative to labor organizations). “The number and power of the lobbying organizations representing American business is indeed surprising in a democracy operating according to the majority rule. The power that the various segments of the business community wield in this democratic system, despite the smallness of their numbers, has not been adequately explained.” *Id.* at 142. “The multitude of workers, consumers, white-collar workers, farmers, and so on are organized only in special circumstances, but business interests are organized as a general rule.” *Id.* at 143.

231. See ARTHUR LEVITT, TAKE ON THE STREET: WHAT WALL STREET AND CORPORATE AMERICA DON’T WANT YOU TO KNOW; WHAT YOU CAN DO TO FIGHT BACK 106–15 (2002) (former SEC chair Arthur Levitt recounting how “the business lobby” and “CEOs” successfully used Congress and the SEC to thwart reform efforts, such as that by the Financial Accounting Standards

in co-opting political leaders for governmental support of deregulatory measures.²³² The struggle against powerful business interests using financial measures to gain the support of politicians is not new.²³³ Nevertheless, these are challenging times. Economic crisis abounds, and, in an effort to avoid greater financial downturns, the government is bailing out those who caused the crisis, at the expense of those who were most harmed. Since reform is often a matter of striking when the iron is hot,²³⁴ one must grant that the heat is fully on.²³⁵ If the current Administration seeks change, there is unlikely to be a better time than now.

V. CONCLUSION

The struggle to address corporate crime has increased, as the costs of corporate crime continue to mount. Just as the physical threat of global terrorism threatens the security of people everywhere and requires a concerted effort to command a defense, so too do the costs of corporate crime, as it undermines security, creates dependency on foreign capital, destabilizes financial markets, destroys personal savings, and diverts public resources from benefiting the greater good to bailing out the corrupt.

Corporations are not inherently evil, but they are structured to pursue profit and minimize firm costs, which is frequently accomplished by shifting

Board to require that options be expensed on corporate income statements); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 343 (1974) (stating that the economic theory of regulation rejects the use of the term “capture” as “inappropriately militaristic,” but recognizes that private interests may subvert regulation); Amy Borrus, *SEC Reforms: Big Biz Says Enough Already*, BUS. WEEK, Feb. 2, 2004, at 43 (detailing the efforts of corporate managers to stifle proxy reform); Amy Borrus & Mike McNamee, *A Legacy that May Not Last*, BUS. WEEK, June 13, 2005, at 39 (discussing business lobbying efforts to frustrate proxy reform).

232. See, e.g., Robert Manor & Stephen J. Hedges, *Gramms Regulated Enron, Benefitted from Ties*, CHI. TRIB., Jan. 18, 2002, at 17 (reporting on the close relationship between Enron and former Senator Phil Gramm and his wife, Wendy Gramm, former chairwoman of the Commodity Futures Trading Commission). As Commodity Futures Trading Commission chairwoman, Wendy Gramm moved to lift governmental oversight on energy contracts that Enron and others traded six days before she resigned her post and five weeks before she joined Enron’s board of directors. *Id.* In December 2000, Senator Phil Gramm sponsored the Commodity Futures Modernization Act, which included an exemption of electronic energy exchanges and is known as the so-called “Enron loophole,” “turning his wife’s deregulation decision into law.” *Id.*; Ginger Szala, *On Second Thought*, FUTURES, Sept. 2007, at 10. Senator Gramm had received more than \$97,000 in campaign contributions from Enron. See Manor & Hedges, *supra*.

233. See DERBER, *supra* note 22, at 23–25 (“A Gilded Age business leader wrote, ‘It matters not one iota what political party is in power or what president holds reins of office.’ The barons had no sentimental loyalty to either Democrats or Republicans because both had become parties of business, a pattern increasingly in evidence today.”); SUTHERLAND, *supra* note 130, at 7–9.

234. Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 186 (2007) (observing that reform moments can rise to spark legislation by bringing together a coalition of willing supporters against those with power to resist reform).

235. See DERBER, *supra* note 22, at 333–39.

those costs to others. Creating a Corporate Crimes Division provides a superior institutional design that can marshal the resources and the expertise necessary to direct a concerted assault on corporate crime.

“[S]mall changes can have large democratizing effects.”²³⁶ Creating a Corporate Crimes Division to focus national policy and to pursue fraudulent activity at the outset will undermine the temptation of big business to pursue profits at any cost, and protect individual investors and the public fisc from the fallout of corporate crimes. Benefits gained from a cohesive national pursuit of corporate criminality well outweigh any risks associated with such a pursuit.

236. ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WIT SMALL 2–3 (2007) (observing that “in most democratic polities, the basic constitutional arrangements are no longer up for grabs,” and thus institutional design change is most likely to be effected on a small scale, but with potentially “large” results).

APPENDIX

